85-67

NO. _____

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ALEXANDER L. STEVAS,

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1984

WILLIAM THOMAS ROBINSON,
Petitioner

VS.

UNITED STATES OF AMERICA,
Respondent

Petition For Writ Of Certiorari To
The United States Court of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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27 pp

QUESTIONS PRESENTED

I. DOES THE SIXTH AMENDMENT RIGHT TO CONFRONT AND CROSS-EXAMINE ONE'S ACCUSER'S PREVENT THE GOVERNMENT FROM INTRODUCING AN EXTRANEOUS OFFENSE OCCURING OUTSIDE THE CONSPIRACY AGAINST A NON-TESTIFYING CO-CONSPIRATOR WHEN THE NON-TESTIFYING CO-CONSPIRATOR'S STATEMENTS DIRECTLY IMPLICATE AND REBUT THE PETITIONER'S DEFENSIVE TESTIMONY?

II. DOES THE SPECIAL PAROLE TERM REQUIRED UNDER 21 U.S.C. 841 AMOUNT TO AN UNCONSTITUTIONAL DELEGATION OF THE LEGISLATIVE AUTHORITY TO SET THE RANGE OF PUNISHMENT FOR AN OFFENSE WHEN THE TRIAL COURT HAS IMPOSED THE MAXIMUM SENTENCE OF CONFINEMENT AUTHORITZED UNDER THE STATUTE?

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NO. _____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1984

WILLIAM THOMAS ROBINSON,
Petitioner

VS.

UNITED STATES OF AMERICA,
Respondent

Petition for Writ of Certiorari to
The United States Court of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this case on March 27, 1985, rehearing denied on April 26, 1985.

OPINIONS BELOW

The opinion of the Court of Appeals is an unpublished opinion, No. 84-1440 (Summary Calendar)(Appendices A and B). The judgment and commitment order of the trial court pursuant to the jury verdict appears as Appendices C and K.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on March 27, 1985. A timely filed petition for rehearing en banc was denied on April 26, 1985. This petition for certiorari is filed within sixty days after final judgment in this case. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United

States Constitution provides, in pertinent part, as follows:

> "No person shall be ... deprived of life, liberty, or property, without due process of law..."

The Sixth Amendment to the United States Constitution provides, in pertinent part, as follows:

> "No person shall be ... deprived of life, liberty, or property, without due process of law..."

Rule 14 of the Federal Rules of Criminal Procedure provides, in pertinent part, as follows:

> "If it appears that a defendant is prejudiced by a joinder of defendants in an indictment or information or by such joinder for trial together, the court may grant a severance of defendants or provide

whatever other relief justice requires..."

21 U.S.C. §841(b)(1)(A) provides, in pertinent part, as follows:

"In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years a fine of not more than $25,000, or both ... Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment ..."

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below.

Petitioner was convicted by a jury of the offenses of conspiracy to possess with intent to deliver dilaudid in Count 1 of the indictment, possession with intent to distribute dilaudid in Count 2 of the indictment, telephone communication to distribute dilaudid in Counts 3 and 4. Petitioner was sentenced to 15 years on Counts 1 and 2; four years on Counts 3 and 4, all running concurrently; and assessed a three (3) year special parole term. (Appendix C)

Petitioner appealed the conviction to the Fifth Circuit Court of Appeals. The opinion of the Fifth Circuit Court of Appeals affirming the convictions and sentence was entered on March 27, 1985. Treating Petitioner's suggestion for rehearing en banc as a petition for panel rehearing on April 26, 1985. The opinion of the Fifth Circuit Court of Appeals was

not published.

B. Statement of Facts

The government relied to a large extent on the content of numerous telephone conversations intercepted from the telephone at Co-Defendant Williams' residence during the time period of May 18 through April 13, 1983. Judge Robert Hill had previously issued an Order allowing said wiretap after Application was made by Assistant United States Attorney Richard Stephens. The Application was supported by the Affidavit of FBI Agent Eugene Gee.

Approximately 400 telephone calls were intercepted by the government during this time period. The government introduced thirteen of these conversations by way of a tape that was played for the jury, and a corresponding transcript that was prepared by the government and provided to the jury

to aid them in listening to these thirteen conversations. (GX 4-A, 4-B). A breakdown of these conversations reveals that seven were between Co-Defendant Williams and his wife, Pam; three between Co-Defendant Rogers and Pam Williams; two between Petitioner and Pam Williams, and one between Pam Williams and American Airlines.

The content of the three conversations between Co-Defendant Rogers and Pam Williams reflects that arrangements were being made for Co-Defendant Williams to travel to Tulsa, Oklahoma on Friday, April 8, 1983 to meet Co-Defendant Rogers. Co-Defendant Rogers related that the money was available for one now, and that probably a few days later money would be available for two more. Co-Defendant Rogers was to meet Co-Defendant Williams at the Tulsa Airport and provide him with

transportation. Co-Defendant Williams was traveling to Tulsa to try and consummate the sale of some horses. In the final conversation Pam Williams related to Co-Defendant Rogers that Co-Defendant Williams had been arrested, and that is why he did not arrive in Tulsa. Co-Defendant Rogers related to Pam Williams that he had been approached by a man at the airport who identified himself as Co-Defendant Williams' brother and struck up a brief conversation with Co-Defendant Rogers.

Co-Defendant Rogers testified that he had had several phone conversations with Co-Defendant Williams and his wife during this time period. Co-Defendant Williams was selling breeding shares to the syndicated race horse "Kiss A Winner." Co-Defendant Rogers wanted to introduce Co-Defendant Williams to his friend, Leon

Dodson, who was interested in purchasing three such breeding shares. Dodson had the money to purchase one on April 8, 1983, and would be able to purchase two more the following week. Co-Defendant Williams was coming to Tulsa to meet Dodson and sell him the breeding share.

Co-Defendant Williams was also coming to Tulsa to meet another acquaintance of Co-Defendant Rogers; Jack Raney. Co-Defendant Williams was to be accompanied on the trip by Petitioner who owned a horse he wanted to sell named "Rickie's Easy Jet." Mr. Raney, communicating through Co-Defendant Rogers, had indicated a desire to meet with Petitioner regarding the sale of "Rickie's Easy Jet." Co-Defendant Rogers had arranged such a meeting. Co-Defendant Rogers did not know who Petitioner was, did not know who would be

accompanying Williams, and had never met, talked to, or heard of Petitioner before trial. Co-Defendant Rogers was at the Tulsa Airport on April 8, 1983 to meet Co-Defendant Williams and Petitioner, and transport them to the two meetings, one with Dodson and one with Raney.

On April 8, 1984, FBI Agent Gee, along with other agents of the FBI and DEA went to the Dallas/Fort Worth Regional Airport (DFW) for purposes of executing search warrants they had previously obtained to search the persons of Co-Defendant Williams and Petitioner. Agent Gee detained Williams and Petitioner at DFW Airport. A search of Williams revealed two American Airlines tickets and boarding passes, one from Amarillo to Tulsa via DFW in Williams' name, and one in Petitioner's name for DFW to Tulsa. (R. 29-33; GX 1-A, B;

2-A, B). During the search of Petitioner, Petitioner reached inside his boots and produced a bottle of tablets from each boot. A label inside each bottle identified the tablets as dilaudid. (R. 33-39; GX-3). DEA chemist Charles Teer testified that the two bottles contained approximately 1,000 tablets of dilaudid.

Petitioner testified that neither Co-Defendant Williams nor Co-Defendant Rogrs knew that the dilaudid was in his boots.

FBI agent Sam Williams testified that he, in an undercover capacity, was present at DFW Airport on April 8, 1984. Agent Williams boarded the same flight to Tulsa that Co-Defendant Williams and Petitioner had intended to be on. Upon arriving in Tulsa he observed Co-Defendant Rogers, approached him, identified himself as Sam Williams, and struck up a brief conversa-

tion with Co-Defendant Rogers. Co-Defendant Rogers indicated that he was at the airport in order to provide transportation for Co-Defendant Williams, and Agent Williams informed Co-Defendant Rogers that Co-Defendant Williams would not be coming. Agent Williams watched Co-Defendant Rogers exit the airport, and then board a flight to Dallas. Co-Defendant was arrested at his mother's home a few weeks later.

At trial, Terry McCuistion was allowed to testify that he had a conversation with Co-Defendant Williams who stated that Petitioner was the supplier of cocaine for McCuistion and Williams and that they would be selling the dilaudid to pay Petitioner for the past cocaine debts and to keep the supply of cocaine flowing. (Appendix J, p.21) Co-Defendant Williams did not testify.

The trial lasted for four and one-half days and the jury deliberated for two full days before reaching a verdict on Count 1 of the indictment around 2:35 p.m. on the third day of deliberations and on Counts 2, 3, and 4 at 3:15 p.m. on the third day of deliberations. (Appendix K, p.p. K-1 through K-3)

REASONS FOR GRANTING THE WRIT

I.

THERE ARE SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT.

There are special and important reasons to consider the issues presented herein. In sustaining Petitioner's conviction in the trial court, the Court of Appeals has effectively ruled that a violation of a defendant's Sixth Amendment right to confront and cross-examine the witnesses against him is harmless error if

the Government has produced sufficient evidence that, if believed by the jury, would be overwhelming evidence of guilt, even when the evidence is closely controverted by the defense. The jury deliberated in this case for nearly three full days before the guilty verdict and was considering finding Petitioner not guilty one one or more counts as evidenced, by the jury note. (Appendix F) In addition, this Court should address the constitutionality of the special parole term in criminal cases where the maximum sentence authorized by Congress has been imposed by the trial court.

II.

THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTION TO SEVER HIS CASE FROM THAT OF THE NON-TESTIFYING CO-CONSPIRATOR WHEN IT BECAME OBVIOUS THAT THE GOVERNMENT INTENDED

TO INTRODUCE A DECLARATION OF AN EXTRANEOUS OFFENSE MADE BY THE NON-TESTIFYING CO-CONSPIRATOR WHICH STATEMENT IMPLICATED PETITIONER IN THE EXTRANEOUS OFFENSE IS A CLEAR VIOLATION OF BRUTON V. UNITED STATES, 391 U.S. 123 (1968).

This Court held in Bruton v. United States, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968) that it was reversible error to introduce into evidence a statement of a non-testifying co-defendant when that statement implicated the other defendant or defendants in the criminal act because the statement was hearsay to the other defendants and effectively deprived them of the right to confront and cross-examine the witnesses against them as guaranteed by the Sixth Amendment. In the Bruton case, this court found that limiting instructions were ineffective to re-

move the prejudice attendant to a hearsay statement implicating the other defendant or defendants.

This Court held for the first time in Harrington v. California, 395 U.S. 250, 23 L.Ed.2d 284, 89 S.Ct. 1726 (1969) that a violation of Bruton can be harmless error under certain special fact situations. In Harrington, the defendant Harrington had made a statement which put him at the scene and accused one of the other four co-defendants of being the "trigger man." The co-defendant who testified placed Harrington at the store with a gun, as did several eyewitnesses. The Court in the Harrington case reiterated its warning in Chapman v. California, 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824 (1967) against too much emphasis on 'overwhelming evidence' of guilt in a case involving vio-

lation of a substantial right to the aggrieved party.

In Nelson v. O'Neil, 402 U.S. 622, 29 L.Ed.2d 222, 91 S.Ct. 1723 (1971), this Court held that the rule announced in Bruton was satisfied when the defendant had the opportunity to cross-examine the co-defendant who made the statement even when the co-defendant denied making the statement.

This Court in Parker v. Randolph, 442 U.S. 62, 60 L.Ed.2d 713, 99S.Ct. 2132 (1979), held by the agreement of five members of the Court that the rule in Bruton is not violated when each co-defendant made an interlocking confession each of which was admitted in a joint trial.

First the trial court held and instructed the jury that "the testimony about the two cocaine transactions and the marijuana

transaction is directed soley to Mr. Williams" (Appendix J, p.15) but then immediately before the introduction of the testimony involving the purported cocaine transaction refering to Petitioner, the trial court instructed the jury "all right. This is being offered as to all defendants. Go ahead." (Appendix J. p. 20) Clearly the admission of the hearsay and the contradictory instructions harmed Petitioner. Petitioner was tried and damaged by the admission of hearsay statements of a co-defendant which statements implicated Petitioner in the extraneous offense of cocaine dealing without allowing any confrontation of the witness against him. The harm was clear under Bruton with or without limiting instructions.

This Court, as far as Petitioner can

determine, has never directly addressed the significance of the Bruton rule in a conspiracey case. Although a co-conspirator's statements made after a defendant has become a member of the conspiracy is admissible if it is made in the course and furtherance of the consiracy, a co-conspirator's statement made outside of and not in furtherance of the conspiracy would seem to be a clear violation of the Bruton rule. The Fifth Circuit itself so held in United States v. Kessler, 530 F.2d 1246 (5th Cir., 1976 -- appeal by gov't dismissed) In addition, the Ninth Circuit held that a severance is mandated when evidence of extraneous offenses is admitted mostly against other co-defendants. United States v. Donaway, 447 F.2d 940 (9th Cir., 1971) By analogy, when an extraneous offense is admitted through the

the out of court statement of one non-testifying defendant, Jerry Williams, but which statements regading the extraneous offense implicates the co-defendant, Petitioner, in the extraneous offense as well as the instant offense, a severance should be granted.

The Petitioner testified that he had met Defendant Jerry Williams at the race tracks in 1976. (trial testimony, Vol. VI, p. 60) Petitioner contacted Mr. Williams for information and advice on horses. (trial testimony, Vol. VI, p. 61-62) Petitioner testified that the flight to Tulsa was to sell his horse Rickie's Easy Jet. (trial testimony, Vol. VI, p. 63).

The admission of the alleged out-ot-court statement of Jerry Williams, therefore, directly contradicted Petitioner's

testimony and implicated Petitioner in an extraneous offense of dealing cocaine. Such damaging testimony insulated from testing by cross-examination clearly harmed Petitioner and is the type of reversible error contemplated by Bruton. Unlike Harrington v. California, 395 U.S. 250, 23 L.Ed.2d 184, 89 S.Ct. 1726 (1969), this Court has an indication of the harm produced on the minds of the jurors from the jury note inquiring about the effect of an acquittal of Petitioner on the other co-defendants. (Appendix F) Clearly, it cannot be said that the Bruton error in the present case was harmless beyond a reasonable doubt as required by Chapman v. California, 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824 (1967).

III.

THE SPECIAL PAROLE TERM IS AN UNCONSTI-

TUTIONAL DELEGATION OF THE LEGISLATIVE FUNCTION OF SETTING PUNISHMENT RANGES.

This Honorable Court has not addressed the constitutionality of the special parole term authorized under 28 U.S.C. 841.

Article 1, Section 1 of the Constitution of the United States of America provides that:

> "Section 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

The function of establishing maximum sentences is a legislative function. United States v. Tebba, 578 F.Supp. 1398 (N.D.Calif., 1984) The Congress far determined that the maximum sentence for each of the offenses for which Appellant was convicted is fifteen years. Although

the statute provides for "a Special parole term of at least 3 years in addition to such term of imprisonment", the Appellant was already sentenced to the maximum term of imprisonment under the statute. Since there is no maximum sentence for a special parole term, a trial court can nullify the legislative intent that an offense have a maximum sentence of fifteen years and in fact can turn a legislatively mandated minor case into a possible life sentence case. United States v. Jones, 540 F.2d 465 (10th Cir., 1976) cert. denied 429 U.S. 1101, 97 S.Ct. 1125, 51 L.Ed. 551; United States v. Dayton, 592 F.2d 253 (5th Cir., 1979)

Appellant recognizes that the special parole term has been upheld on other grounds. United States v. Martinez, 481 F.2d 214 (5th Cir., 1973); cert. denied

415 U.S. 931, 94 S.Ct. 1444, - 39 L.Ed.2d 489; United States v. Simpson, 481 U.S. 1095, 94 S.Ct. 728, 38 L.Ed.2d 553. Appellant believes that the statute has not been previously attacked on these grounds.

Appellant contends that the two-year special parole term is, therefore, unconstitutional.

CONCLUSION

For these reasons, Petitioner respectfully prays that the petition for certiorari to the United States Court of Appeals for the Fifth Circuit issue.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 84-1440

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JERRY DWAIN WILLIAMS, WILLIAM THOMAS ROBINSON, a/k/a/ Sonny Robinson and AVERY ROGERS,
Defendants-Appellants

Appeal from the United States District Court for the Northern District of Texas

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ON PETITIONS FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion March 27, 5 Cir., 1985, _____F.2d_____)

(APRIL 26, 1985)

Before JOHNSON AND JOLLY, Circuit Judges and BOYLE*, District Judge.

PER CURIAM:

(X) The Petitions for Rehearing as to Williams and Robinson are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for rehearing En Banc is DENIED.

( ) The Petitions for rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal) Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

E Grady Jolly/S
United States Circuit Judge REHG-7

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*District Judge of the Eastern District of Louisiana, sitting by designation.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 84-1440
Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JERRY DWAIN WILLIAMS, WILLIAM THOMAS ROBINSON, a/k/a SONNY ROBINSON, AND AVERY ROGERS,
Defendant-Appellants.

Appeal from the
United States District Court
for the Northern District of Texas

(March 27, 1985)

Before JOHNSON and JOLLY, Circuit Judges,

and BOYLE,* District Judge.

*District Judge of the
Eastern District of Louisiana,
sitting by designation

PER CURIAM:**

Jerry Dwain Williams, Avery Rogers, and William Thomas Robinson were charged in an eight-count indictment in the Northern District of Texas. Count 1 charge Williams, Rogers and Robinson with entering into a conspiracy to knowingly and intentionally possess dilaudid with the intent to distribute it in violation of 21 U.S.C. §841(a)(1). Count 2 charged Williams and Robinson with knowingly and intentionally possessing with the intent to distribute, approximately 1,000 tablets of dilaudid in violation of 21 U.S.C. §841(a)(1) and 18

**Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

U.S.C. §2. Each defendant was also charged on two counts of knowingly and intentionally using a telephone to facilitate the illegal distribution of dilaudid. After a joint trial from April 10 to April 24, 1984, all defendants were convicted on each count charged.

Williams, Rogers and Robinson challenge their convictions on various grounds. We have reviewed each of the grounds alleged by each defendant. We are not persuaded by their arguments, as we explain in detail in the text of this opinion, and accordingly, affirm their convictions.

I.

Williams, Rogers and Robinson were charged with conspiring to possess and distribute illegal controlled substances from March 30, 1983 to April 8, 1983. During this time, Williams and his wife

were living in Weatherford, Texas, with Williams spending much of his time in Amarillo, Texas. Robinson also lived in Weatherford, Texas. The third indicted co-conspirator, Rogers was in the automobile business in Hobart, Oklahoma.

On March 18, 1983, an assistant United States Attorney filed an application to wiretap the telephone at Williams' residence. The application was supported by an affidavit of an FBI agent stating that there was probable cause to believe that Williams, Robinson and Rogers were involved in the possession and distribution of illegal controlled substances, that there was probable cause to believe that infomation concerning these offenses could be obtained by the interception of wire communications, and that normal investigatory procedures were not likely to succeed

in locating the source of the illegal drugs. Based on this information, then District Judge Hill authorized the interception and monitoring on conversations on Williams' telephone.

The government intercepted approximately four hundred calls; thirteen of these conversations, all occuring between March 30, 1983 and April 8, 1983, were admitted into evidence. In a March 30, 1983 telephone conversation which was admitted into evidence, Williams requested that his wife get in touch with Rogers. Williams also told his wife that "they'll definitely take five this time - and they might go ahead and take twice that many thousand."

In an April 4, 1983 telephone coversation, Avery Rogers left a message with Williams' wife that Jerry [Williams]

should not come until Friday. Mrs. Williams conveyed this message to Williams when he telephoned his residence from Amarillo later that day. There were also several calls between the Williams in which the terms of the "deal" were discussed.

On Thursday, April 8, 1983, Mrs. Williams telephone Robinson that she had scheduled a flight for him to Tulsa, departing from the Dallas/Fort Worth airport. Mrs. Williams also told Robinson that he would be travelling with Williams and that "you definitely have to go up there tomorrow."

Mrs. Williams also used the telephone at the Williams' residence to coordinate the meeting between Williams, Robinson and Rogers at the Tulsa airport. Pursuant to her husband's request, she in-

formed Rogers that Williams would meet him at the Tulsa airport on Friday. Rogers responded that he just needed "one of 'em." Mrs. Williams then called her husband and confirmed that Rogers would meet him in Tulsa, and also told him that Rogers had said "all he needed tomorrow was one," and "Tuesday or Wednesday they'll take two more."

On April 8, 1983, FBI Special Agent Eugene Gee, after obtaining a search warrant for Williams and Robinson, went to the Dallas/Fort Worth airport to execute the warrant. Williams was found to be in possession of two airline tickets and boarding passes for both Robinson and himself. Robinson had concealed in his boots two bottles of dilaudid, together containing approximately 1,000 tablets.

Agent Gee, in an undercover capacity,

boarded the flight to Tulsa. At the Tulsa airport, he approached Rogers, and introduced himself as Sam Williams. He then confirmed that Rogers was waiting for Williams, and told him that Williams would not be able to meet him in Tulsa. Rogers was later arrested.

II.

We first address the admission of the alleged extrinsic acts of Rogers and Williams. The trial court admitted into evidence against Williams the testimony of Terry McCuistion. McCuistion and Williams were in the cocaine business together. McCuistion testified regarding a conversation that he had with Williams in which Williams stated that he was planing to use the money received from the sale of dilaudid to Rogers to pay off a debt to Robinson for some cocaine pre-

viously purchased and to get more cocaine "moving into Amarillo by paying off Robinson." The conversation between McCuistion and Williams occurred in Amarillo, Texas, on April 5 or 6, 1983, a few days before Williams was arrested.

The trial court also admitted the testimony of Lawice Cooper. Cooper testified that he met Rogers in a bar in Talequah, Oklahoma, and that Rogers bragged that he was the main supplier of dilaudid in the area. This conversation occurred in late March or early April, 1983.

Williams argues that McCuistion's testimony should not have been admitted against him because it is an extrinsic offense which fails to satisfy the test of United States v. Beechum, 582 F.2d 898

(5th Cir. 1978) (en banc).[1] Rogers similarly challenges the introduction of Cooper's testimony. Rogers argues that his evidence does not show that he joined in a conspiracy with Williams or Robinson, and that the evidence, at best, shows only that Rogers attempted to purchase illegal drugs in a separate transaction.

The introduction of evidence of other

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[1] Beechum, requires that evidence of other crimes meet a two-part test in order to be admissible. 582 F.2d at 911. First, evidence of the extrinsic offense must be introduced to establish something other than the defendant's character. Second, the probative value of the evidence must not be sibstantially outweighed by its prejudicial effect, and must meet the other requirements of Fed.R.Evid. 403. Id.

crimes is governed by Fed.R.Evid.404(b).[2] Before a determination can be made of admissibility of this evidence under Rule 404(b), however, it is of vital importance to review the evidence in the context of the trial. Williams' defense was that he and Rogers were interested in buying and selling horses, and that all telephone conversations and the trip to Tulsa related to that business purpose and not to the sale of drugs. The evidence was thus clearly admissible under Rule 404(b) to

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[2]Fed.R.Evid. 404(b) provides:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

show knowledge or the lack or absence of mistake or accident on the part of Williams and Rogers concerning the presence of the dilaudid found on Robinson in the Dallas-Fort Worth airport. We hold, therefore, that the test of Beechum was met. The evidence was introduced to show Williams' intent and motive for going to Tulsa, and to show Rogers' motive for being at the Tulsa airport; its probative value exceeded its prejudicial effect.[3] Thus it cannot be said that this testimony was admitted solely to prove Rogers' or Williams' bad character or propensity to violate the narcotics law.

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[3]The government argues that the acts were "inextricably intertwined" with the offense charge, and therefore are not "extrinsic offenses." We find it unnecessary to address this argument, since the test of Beechum is met.

III.

We now turn to the denial of the motions for severance. Appellant Robinson argues that he was deprived of a fair trial since the district court failed to grant his motion to sever after it had allowed the testimony of McCuistion and Cooper. He argued that these witnesses testified as to extraneous offenses against his co-defendants, and that was prejudiced by its introduction in his trial. Appellant Williams also complains that he should have been granted a severance because of the admission of Cooper's testimony.

The district court instructed the jury that McCuistion's testimony regarding Williams' narcotics dealing for three consecutive months prior to the conspiracy was admitted against Williams only, and

was not to be considered against Robinson or Williams. Both instructions were repeated to the jury at the conclusion of the trial. We do not find that the jury was confused or misled by the testimony of McCuistion and Cooper, and hold that the district court did not abuse its discretion in failing to grant Robinson and Williams a severance under the facts of this case. See United States v. Cuesta, 597 F.2d 903 (5th Cir. 1979).

IV.

The next point we take up is the admission of hearsay statements. Rogers alleges that McCuistion's testimony that Williams was going to meet him at the Tulsa airport was inadmissible hearsay evidence. Hearsay statements generally are inadmissible until it is shown by substantial independent evidence that (1) a conspiracy ex-

isted, (2) that the co-conspirator and the defendant against whom the co-conspirator's statement is offered were members of the conspiracy, and (3) that the statements were made in the course of and in furtherance of the conspiracy. United States v. James, 590 F.2d 575 (5th Cir. 1979)(en banc). See also Fed.R.Evid. 801(d)(2)(E).

Rogers presents a persuasive argument that Williams' statement to McCuistion was not made in furtherance of the conspiracy. We do not find it necessary to decide this issue since, even if we view the admission of this statement as error, we are persuaded that it was harmless. The statement simply gave the reason for Rogers' presence at the airport, and Williams' reason for going there. It is undisputed that Rogers was at the airport waiting for

Williams and Robinson, that Williams and Robinson were on their way to Tulsa at the time they were arrested and that they were found to be in possession of the dilaudid. Rogers had bragged, according to sworn testimony, that he was the biggest dilaudid dealer in his area. Transcripts of conversations between Rogers and Mrs. Williams in which he arranged the meeting in Tulsa were introduced into evidence, and establish the reason the parties were meeting at the Tulsa airport. Additionally, the transcript of his telephone conversation following the arrests of Williams and Robinson substantiate the reason for his presence at the airport. In view of the evidence against Rogers, McCuistion's hearsay testimony that Williams had stated that he, Williams was going to Tulsa to deliver dilaudid to

Rogers was hardly more than cumulative, and admitting this hearsay against Rogers was clearly harmless error.

V.

Our review now addresses the wiretap order. Judge Hill's March 18, 1983 order authorized the FBI "to intercept wire communications of Carrol Hubert Hamm, Jerry D. Williams, Sonny Robinson, Avery Rogers and others yet unknown." The order did not, however, name Mrs. Williams. Williams, Robinson and Rogers assert that the wiretap evidence should have been suppressed on two bases. First, they argue that the order was improperly issued because Mrs. Williams was not named in the order, even though the government knew her conversations would be intercepted. Second, they argue that the affidavit did not contain sufficient information indi-

cating the necessity for the interception.

The appellants' first argument was addressed by this court in United States v. Sklaroff, 552 F.2d 1156 (5th Cir. 1977). There, the appellants argued that the government had probable cause to believe that one of the defendants, Leppo, was committing an offense, and that the wiretap order was invalid, since he was not listed. This court, relying on United States v. Donovan, 429 U.S. 413, 97 S.Ct. 658, 50 L.Ed.2d 652 (1977), held that even if Leppo was a "known person" who should have been named in the order, it was not necessary to suppress the evidence obtained against him.

Similarly, in United States v. Doolittle, 597 F.2d 1368 (5th Cir. 1975), the appellants Anderson and Baxter argued that the government had probable cause to be-

lieve that their conversations would have been intercepted, and that the wiretap authorization was invalid since they were not named. Again, this court rejected the appellants' argument. The court stated that neither defendant alleged or demonstrated any prejudice in not being named in the authorization, since they were given the same rights as a party named in the order. Additionally, the court noted that most of the conversations were with Doolittle, the person named in the order, and that there was no bad faith on the part of the government.

It is clear to us that Judge Hill's wiretap order is valid, despite the failure to name Mrs. Williams in the application. Agent Gee testified that at the time of the wiretap application, the government did not have sufficient know-

ledge of Mrs. Williams' participation in the conspiracy. Additionally, we do not see what harm the appellants, all of whom were named in the wiretap order, suffereed as a result of Mrs. Williams not being named.

Rogers', Robinsons' and Williams' second contention is that the affidavit in support of the application for the wiretap order was inadequate, since it did not demonstrate the necessity for the interception. See 18 U.S.C. §2518 (1)(c). The FBI agent's affidavit recited the following specifice reasons for the need for the wiretap orders: (1) surveillance previously conducted failed to identify members of the conspiracy and sources of the narcotics; (2) continued surveillance would risk detection and end the investigation prematurely; (3) continued sur-

veillance of Williams' house not possible because of its location; (4) confidential informants stated that Williams generally conducted his drug business using the telephone, or in a secure location; (5) the witness and informants were unable to provide testimony that would identify sources and assets; (6) the confidential informants said that they would not testify nor would they record conversations; (7) search warrants would not identify Williams' source, or other members of the conspiracy; (8) attempts were made to infiltrate with an undercover agent, but the attempts failed; (9) informants stated that undercover agents could not be introduced because Williams could not deal with strangers; (10) the introduction of undercover agents in this investigation would lead to a buy/bust

which would not identify sources or location of assets.

In United States v. De La Fuente, 548 F.2d 528 (5th Cir. 1978), we considered a similar challenge to the government's showing on a need for a wiretap. Citing United States v. Robrtson, 504 F.2d 289 (5th Cir. 1974), cert. denied, 421 U.S. 913, the court noted:

> We first note that sections 2518(1)(c) and (3)(c) must be read in a common sense fashion. "They are simply designed to assure that wiretapping is not resorted to a situation where traditional investigative techniques would suffice to expose the crime." United States v. Kahn, 18974, 415 U.S. 143, 153 n.12, 94 S.Ct. 977, 983, 39 L.Ed.2d 225....Their purpose "is not to foreclose electronic surveillance until

very other imaginable method of investigation has been unsuccessfully attempted, but simply to inform the issuing judge of the difficulties involved in the use of conventional techniques." United States v. Pacheco, 5 Cir. 1974, 489 F.2d 554. The provisions contemplate that "the showing be tested in a practical and commonsense fashion." S.Rep. No. 1097, 90th Cong., 2d Sess., 100 U.S. Code Cong. & Admin. News 1968, pp. 2112, 2190.

Similarly, the affidavit here alleged sufficient facts, when exmined in a "common sense" manner, to explain the necessity for the wiretap and meet the requirements of the statute. We hold, therefore, that the appellants argument that the affidavit was insufficient to meet the requirements of 18 U.S.C. § 2518(1)(c)

is without merit.

VI.

Williams raises the question of privileged marital communications and argues that the recorded conversation between himself and Mrs. Williams should have been excluded. Williams argues that he and his wife had a reasonable expectation of privacy with respect to their conversations, and neither of them knew that their conversations were being overheard and recorded.

Although interspousal communication is presumed to be confidential, that presumption can be overcome by proof that it was not intended to be private. Pereira v. United States, 347 U.S. 1, 6, 74 S.Ct. 358, 361, 98 L.Ed. 435 (1954). A communication is not private when the information conveyed is intended to be transmitted to

a third person. Id. A review of the conversation between Williams and his wife clearly indicates that the conversations were not intended to remain in confidence. Rather, it was intended that the information conveyed be passed on to third parties. We hold, therefore, that the marital privilege is not available to exclude the conversation between Williams and his wife.

There is a second basis for rejecting Williams' argument. Williams raises the same argument that was raised before us in United States v. Mendoza, 574 F.2d 1373 (5th Cir. 1979). There the court had to decide whether the introduction of the tapes constituted inadmissible evidence by Mrs. Mendoza as to confidential conversations with the defendant Mendoza. This court rejected Mendoza's argument

and held that "conversations between a husband and wife about crimes in which they are jointly participating when the conversations occur are not marital communications for the purpose of the marital privilege, and thus do not fall within the privilege's protection of confidential marital communications."

The holding of Mendoza was recently affirmed by this court in United Staes v. Archer, 733 F.2d 354 (5th Cir. 1984). In Archer, Mr. and Mrs. Archer were both convicted of conspiring to embezzle funds. Mr. Archer sought to exclude responses to questions asked him during cross-exminations about statements he made to his wife. Relying on Mendoza, the court rejected Archer's argument that the conversations were privileged, and held that since these statements were made in the

course of a conspiracy to which both spouses were parties, the communications were not privileged.

Williams argues that both Archer and Mendoza are distinguishabel from his case because his wife was not named as a co-conspirator, and was not indicted. We reject Williams' argument. The conversations between him and his wife were made in furtherance of the conspiracy to distribute illegal drugs. We do not find Archer and Mendoza distinguishable under the facts of this case. See also United States v. Harrelson, No. 83-1199, slip op. at 2936 (5th Cir. Feb. 15, 1985).

VII.

Finally, our attention is called to the special parole term of three years in addition to the period of confinement imposed in this case. The defendants Robin-

son and Williams argue that the special parole is an improper delegation of the legislative function, and therefore is unconstitutional. They primarily rely on United States v. Tebba, 578 F.Supp. 1398 (N.D. Cal. 1984) in support of their arguments.

In Tebba, a California district judge found that the failure of 21 U.S.C. §841(b)(1)(A) to provide for a maximum sentence was unconstitutional on two grounds. First, the district judge stated that the special parole sentence violated the principle of separation of powers since the determination of a maximum sentence is a legislative, rather than a judicial function. The district judge also stated that the provision violated the due process clause of the fifth amendment since there is no provision for no-

tice to the potential parolee of the maximum penalty if the parolee violates the special parole order.

We reject the appellants' argument. The Tebba opinion is a decision of a California district court and is in direct conflict with our opinion in United States v. Simpson, 481 F.2d 582 (5th Cir. 1973). In Simpson we specifically stated that the special parole sentence does not violate the due process clause of the fifth amendment. Furthermore, the Tebba rationale has been expressly rejected and the flaws of its analysis exposed by another district court, see United States v. Lockley, 590 F.Supp. 1215 (D.D. Ga. 1984). The district court in Lockley stated that, contrary to Tebba, there was no violation of separation of powers where the legislature leaves it to the judicial discre-

tion to set a maximum penalty. The court also rejected the argument that there was a due process violation, since the statute establishes the maximum term of imprisonment for violation of the special parole to be the amount of the original sentence plus the special parole period. See also United States v. Davi, 588 F.Supp. 91 (E.D. N.Y. 1984).

The only concern raised in Tebba not addressed in either Lockley or Davi is whether the failure of the statute to provide for a maximum period of the special parole sentence violates due process. In Simpson this court noted that the court has wide discretion over the imposition of criminal sentences, and in the case of criminal contempt, it has "unlimited discretion as to the length of a sentence to be imposed." Similarly, in Simpson, we

did not consider the lack of a maximum term of the special parole provision to violate due process. Accordingly, we hold that the special parole sentence is constitutional, and reject the appellants' arguments to the contrary.

VIII.

We have given careful consideration to each argument presented by Williams, Rogers and Robinson. We are not persuaded that any issue raised entitles them to a reversal or a new trial. Accordingly, their convictions are

A F F I R M E D.

APPENDIX C

UNITED STATES OF AMERICA	UNITED STATES DISTRICT COURT FOR
VS	NORTHERN DISTRICT OF TEXAS
WILLIAM THOMAS ROBINSON a/k/a SONNY ROBINSON	FORT WORTH DIVISION
	DOCKET NO. CR-4-83-90

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date----------May 11, 1984

___ WITHOUT COUNSEL — However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

_X_ WITH COUNSEL — Jerry Loftin, employed counsel.

___ GUILTY, and the court being satisfied that there is a factual basis for the plea,

___ NOLO CONTENDERE, _X_ NOT GUILTY

___NOT GUILTY
Defendant is
discharged.

There being a
verdict of

___GUILTY as to
Counts 1, 2,
3, and 4.

Defendant has been convicted as charged of the offense(s) of Conspiracy; Possession with Intent to Distribute Dilaudid, a Schedule II Controlled Substance; Use of Telephone facility in Possession with Intent to Distribute Dilaudid, a Schedule II controlled Substance; Aiding and Abetting, in violation of Title 21, U.S.C. 846; 841(a)(1); 843(b), 18 USC 2.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and

ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of fifteen (15) years on Count 1; fifteen (15) years on Count 2; four (4) years on Count 3; and, four (4) years on Count 4.

IT IS FURTHER ORDERED that said sentences on Counts 2, 3 and 4 shall run concurrently with sentence imposed on Count 1.

IT IS FURTHER ORDERED that a special parole term of three (3) years be assessed in addition to the period of confinement.

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation,

and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends, that the defendant be committed at Federal Prison Camp, Big Spring, Texas or FCI, Ft. Worth, Texas.

David O. Belew, Jr./S

Date 5-11-84

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA	*	
	*	CRIMINAL NO.
	*	CR 4-83-090
V.	*	
	*	
WILLIAM THOMAS ROBINSON, also known as Sonny Robinson	*	
JERRY DWAIN WILLIAMS	*	
AVERY ROGERS	*	

The Grand Jury charges:

COUNT 1

1. From on or about March 30, 1983, and continuously thereafter up to and including April 8, 1983, in the Northern District of Texas, and elsewhere, WILLIAM THOMAS ROBINSON, also known as Sonny Robinson, JERRY DWAIN WILLIAMS, and AVERY ROGERS, defendants, knowingly and intentionally did combine, conspire, confede-

rate and agree together, and with each other and with other persons, known and unknown to the Grand Jury, to commit offenses against the laws of the United States, to wit, to knowingly and intentionally possess with intent to distribute and to distribute dilaudid, a Schedule II controlled substance, violations of Title 21, United States Code, Section 841(a)(1).

2. On or about the dates hereinafter mentioned, the following acts were committed in furtherance of said conspiracy and to effect the objects thereof:

OVERT ACTS

1. On or about March 30, 1983, JERRY DWAIN WILLIAMS had a telephone conversation with Pam Williams in which he told her that he had 2,000 sold but that A's man had made a purchase the previous week and could only take 500 on Friday.

2. On or about March 30, 1983, JERRY DWAIN WILLIAMS had a telephone conversation with Pam Williams in which he told her he had been talking to AVERY.

3. On or about April 4, 1983, AVERY ROGERS had a telephone conversation with Pam Williams in which he told her to tell Jerry not to come until Friday.

4. On or about April 4, 1983, JERRY DWAIN WILLIAMS had a telephone conversation with Pam Williams in which he said he had talked with Sonny Robinson and then inquired if anyone had called him. Pam Williams told JERRY DWAIN WILLIAMS that Avery had called and had said that it would be Friday. JERRY DWAIN WILLIAMS then asked if AVERY had said how many and Pam Williams replied that he had not.

5. On or about April 5, 1983, JERRY DWAIN WILLIAMS had a telephone conversa-

tion with Pam Williams in which he told her to call that man after seven and tell him everything was set to go on the horse deal for Thursday night or Friday morning and the amount was good and that they will want more horses the following week. He further told Pam Williams to tell him that it had to be Thursday or Friday because Avery's wife was in the hospital.

6. On or about April 5, 1983, after seven o'clock, Pam Williams had a telephone conversation with WILLIAM THOMAS ROBINSON in which she told him that Jerry would be coming in and they would go together and that Friday would be better because the wife of one of the guys was in the hospital.

7. On or about April 7, 1983, JERRY DWAIN WILLIAMS had a telephone conversation with Pam Williams in which he told

her to make airline reservations for him from Amarillo to Dallas/Fort Worth and then to Tulsa. He further told her to tell Sonny they would meet at the airport and go from there.

8. On or about April 7, 1983, Pam Williams had a telephone conversation with WILLIAM THOMAS ROBINSON in which she told him that he was to meet Jerry at Dallas/ Fort Worth Airport and then fly to Tulsa together. WILLIAM THOMAS ROBINSON replied that would be okay and then received the flight information from Pam Williams.

9. On or about April 7, 1983, JERRY DWAIN WILLIAMS had a telephone conversation with Pam Williams in which she stated she had called Sonny, and JERRY DWAIN WILLIAMS told her to call Avery and tell him what's happening.

10. On or about April 7, 1983, Pam

Williams had a telephone conversation with AVERY ROGERS in which she told him that Jerry would be up the following day at 3:50 p.m. on American Airlines. AVERY ROGERS responded okay and to tell Jerry it was only for one and that the other two or more would go the next Tuesday or [illegible]-day.

11. On or about April 8, 1983, JERRY DWAIN WILLIAMS flew from Amarillo, Texas, to Dallas/Fort Worth airport and met WILLIAM THOMAS ROBINSON.

12. On or about April 8, 1983, JERRY DWAIN WILLIAMS carried in his pocket, American airline tickets for Sonny Robinson and himself from Dallas/Fort Worth to Tulsa, Oklahoma.

13. On or about April 8, 1983, WILLIAM THOMAS ROBINSON carried in his boots, approximately 1,000 tablets of dilaudid.

14. On or about April 8, 1983, AVERY ROGERS went to the airport in Tulsa, Oklahoma, to meet JERRY DWAIN WILLIAMS.

A violation of Title 21, United States Code, Section 846.

COUNT 2

On or about April 8, 1983, in the Fort Worth Division of the Northern District of Texas, WILLIAM THOMAS ROBINSON and JERRY DWAIN WILLIAMS, defendants, knowingly and intentionally did possess with the intent to distribute, approximately 1,000 tablets of dilaudid, a Schedule II controlled substance.

A violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

COUNT 3

On or about April 5, 1983, in the Fort Worth Division of the Northern District of

Texas, WILLIAM THOMAS ROBINSON, defendant, knowingly and intentionally did use a communication facility, that is, a telephone, in facilitating the knowing and intentional possession with intent to distribute by WILLIAM THOMAS ROBINSON and JERRY DWAIN WILLIAMS of dilaudid, a Schedule II controlled substance, a felony under Title 21, United States Code, Section 841(a)(1), in that WILLIAM THOMAS ROBINSON used the telephone to receive information regarding when he and JERRY DWAIN WILLIAMS would get together to take dilaudid to Avery Rogers.

A violation of Title 21, United States Code, Section 843(b), and Title 18, United States Code, Section 2.

COUNT 4

On or about April 7, 1983, in the Fort Worth Division of the Northern District of Texas, WILLIAM THOMAS ROBINSON, defendant,

knowingly and intentionally did use a communication facility, that is, a telephone, in facilitating the knowing and intentional possession with intent to distribute by WILLIAM THOMAS ROBINSON and JERRY DWAIN WILLIAMS of dilaudid, a Schedule II controlled substance, a felony under Title 21, United States Code, Section 841(a)(1), in that WILLIAM THOMAS ROBINSON used the telephone to agree to meet JERRY DWAIN WILLIAMS at Dallas/Fort Worth Airport and then fly with him to Tulsa, Oklahoma, to deliver dilaudid.

A violation of Title 21, United States Code, Section 843(b), and Title 18, United States Code, Section 2.

COUNT 5

On or about April 5, 1983, in Fort Worth Division of the Northern District of Texas, JERRY DWAIN WILLIAMS, defendant,

knowingly and intentionally did use a communication facility, that is, a telephone, in facilitating the knowing and intentional possession with intent to distribute by WILLIAM THOMAS ROBINSON and JERRY DWAIN WILLIAMS of dilaudid, a Schedule II controlled substance, a felony under Title 21, United States Code, Section 841(a)(1), in that JERRY DWAIN WILLIAMS used the telephone to send instructions to WILLIAM THOMAS ROBINSON that their deal to take dilaudid to AVERY ROGERS was set to go on Thursday or Friday.

A violation of Title 21, United States Code, Section 843(b), and Title 18, United States Code, Section 2.

COUNT 6

On or about April 7, 1983, in the Fort Worth Division of the Northern District of Texas, JERRY DWAIN WILLIAMS, defendant,

knowingly and intentionally did use a communication facility, that is, a telephone, in facilitating the knowing and intentional possession with intent to distribute by WILLIAM THOMAS ROBINSON and JERRY DWAIN WILLIAMS of dilaudid, a Schedule II controlled substance, a felony under Title 21, United States Code, Section 841(a)(1), in that JERRY DWAIN WILLIAMS used the telephone to send instructions to make airline reservations for him from Amarillo to Dallas/Fort Worth and then to Tulsa in order to take dilaudid to AVERY ROGERS.

A violation of Title 21, United States Code, Section 843(b), and Title 18, United States Code, Section 2.

COUNT 7

On or about April 4, 1983, in the Fort Worth Division of the Northern District of Texas, AVERY ROGERS, defendant, knowingly

and intentionally did use a communication facility, that is, a telephone, in facilitating the knowing and intentional possession with intent to distribute by WILLIAM THOMAS ROBINSON and JERRY DWAIN WILLIAMS of dilaudid, a Schedule II controlled substance, a felony under Title 21, United States Code, Section 841(a)(1), in that AVERY ROGERS used the telephone to send instructions to JERRY DWAIN WILLIAMS to not bring the dilaudid to him until Friday.

A violation of Title 21, United States Code, Section 843(b), and Title 18, United States Code, Section 2.

COUNT 8

On or about April 7, 1983, in the Fort Worth Division of the Northern District of Texas, AVERY ROGERS,defendant, knowingly and intentionally did use a communication

facility, that is, a telephone, in facilitating the knowing and intentional possession with intent to distribute by WILLIAM THOMAS ROBINSON and JERRY DWAIN WILLIAMS of dilaudid, a Schedule II controlled substance, a felony under Title 21, United States Code, Section 841(a)(1), in that AVERY ROGERS used the telephone to receive information regarding when he was to meet JERRY DEWAIN WILLIAMS at the Tulsa Airport and receive the dilaudid.

A violation of Title 21, United States Code, Section 843(b), and Title 18, United States Code, Section 2.

A TRUE BILL

_____

FOREMAN

James A. Rolfe/S
JAMES A. ROLFE
United States Attorney

Richard H. Stephens/S
RICHARD H. STEPHENS
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1100 Commerce, Room 16G28
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APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA	*	
V.	*	CRIMINAL NO. 4-83-090
WILLIAM THOMAS ROBINSON Also known as SONNY ROBINSON JERRY DWAIN WILLIAMS AVERY ROGERS	*	

CHARGE OF THE COURT

MEMBERS OF THE JURY:

Now that you have heard the evidence and the argument, the time has come to instruct you as to the law governing this case.

Although you as jurors are the sole judges of the facts, you are duty bound to follow the law as stated in the instruc-

tions of the Court and to apply the law so given to the facts as you find them from the evidence before you.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

Neither are you to be concerned with the wisdom of any rule of law. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the indictment and the denial made by the "not guilty" plea of the accused. You are to perform this duty without bias or prejudice, or public opinion. The accussed

and the public expect that you will carefully and impartially consider all the evidence, follow the law as stated by the Court and reach a just verdict regardless of the consequences.

A separate crime or offense is charged against one or more of the Defendants in each count of the indictment. Each offense, and the evidence pertaining to it, should be considered separately. Also, the case of each Defendant should be considered separately and individually. The fact that you may find one or more of the accused guilty or not guilty of any of the offenses charged should not control your verdict as to any other offense or any other Defendant.

I caution you, members of the Jury, that you are here to determine the guilt or innocence of the accused from the evi-

dence in this case. The Defendant is not on trial for any act or conduct or offense not alleged in the indictment. Neither are you called upon to return a verdict as to the guilt or innocence of any other person or persons not on trial as a Defendant in this case.

Also, the punishment provided by law for the offense charged in the indictment is a matter exclusively within the province of the court or judge, and should never be considered by the jury in any way, in arriving at the impartial verdict as to the guilt or innocence of the accused.

The indictment or formal charge against a defendant is not evidence of guilty. Indeed, the defendant is presumed by the law to be innocent. The law does not require a defendant to prove his innocence or pro-

duce any evidence at all. The government has the burden of proving him guilty beyond a reasonable doubt, and if it fails to do so you must acquit him.

Thus, while the government's burden of proof is a strict or heavy burden, it is not necessary that the defendant's guilt be proved beyond all possible doubt. It is only required that the government's proof exclude any "reasonable doubt" concerning the defendant's guilt.

A "reasonable doubt" is real doubt, based upon reason and common sense after careful and impartial consideration of all the evidence in the case.

Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of you own affairs. If

you are convinced that the accused has been proved guilty beyond reasonable doubt, say so. If you are not convinced, say so. Any evidence as to which an objection was sustained by the Court, or any evidence ordered stricken by the Court, must be entirely disregarded.

The jury will remember that a defendant is never to be convicted on mere suspicion or conjecture.

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. A witness is presumed to speak the truth. But this presumption may be outweighed by the way in which the witness testifies, by the character of the testimony given, or by contradictory evidence. You should carefully scrutinize the testimony given, the circumstances under which each witness has

testified, and every manner in evidence which tends to indicate whether the witness is worthy of belief. Consider each witness's intelligence, motive, and state of mind, and demeanor and manner while on the stand. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollections, like failure of recollection,

is not an uncommon experience. In weighing the effect of a discrepancy, consider whether it pertains to a matter of imporance or an unimportant detail, and whether the discrepancy results from innocent error or willfull falsehood. If you find the presumption of truthfulness to be outweighted as to any witness, you will give the testimony of that witness such credibility, if any, as you may think it deserves.

There are two types of evidence from which a jury may properly find a defendant guilty of a crime. One is direct evidence-such as the testimony of any eyewitness. The other is circumstantial evidence -- the proof of a chain of circumstances pointing to the commission of the offense.

As a general rule, the law makes no distinction between direct and circumstan-

tial evidence, but simply requires that, before convicting a defendant, the jury be satisfied of the defendant's guilt beyond a reasonable doubt from all the evidence in the case.

You are entitled to use your common sense. You are entitled to draw deductions from the evidence by the use of your common sense, and try to arrive at the truth of the situation in the light of the Court's instructions as a whole, and particularly the one as to the burden of proof. The trial of a case is not a game. The outcome of this case is important to the public and it is important to the defendant. Both sides are entitled to have you make your best effort to decide what the truth is in this situation in the light of the evidence that you have heard, by the use of your common sense. If you

are considering a matter that is favorable to the government and you are satisfied that it is true beyond a reasonable doubt, then that is the truth in this case. If you are considering a matter that is favorable to the defendant and you believe that it is true, or if you have a reasonable doubt as to whether it is true, then that is the truth as far as this case is concerned. In other words, we are getting back to the proposition that you must arrive at the facts from the evidence that you have heard here and draw whatever deductions you think are logical and reasonable. However, you must weigh the evidence and evaluate it in the light of the courts's instructions on the burden of proof.

The rules of evidence provide that if scientific, technical, or other spec-

ialized knowledge might assist the jury in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify and state his opinion concerning such matters.

You should consider each expert opinion received in evidence in this case and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, then you may disregard the opinion entirely.

Transcripts of tape recordings have been admitted into evidence for the limit-

ed purpose of assisting in establishing the identity of the speakers at a particular time and assisting in understanding less audible portions of the tape recordings. If there is any conflict between the transcript and the tape recording (either in the identity of the speaker or the content of the conversation), disregard that conflicting portion of the transcript and be guided solely by the tape recordings. If you cannot determine from the tape recording that particular words were spoken you must disregard the transcript insofar as those words are concerned.

In determining whether any statement, claimed to have been made by a Defendant outside of court and after an alleged crime has been committed, was knowingly and voluntarily made, the jury should con-

sider the evidence concerning such a statement with caution and great care, and should give such weight to the statement as the jury feels it deserves under all the circumstances.

The jury may consider in that regard such factors as the age, sex, training, education, occupation, and physical and mental condition of the Defendant, his treatment while under interrogation, and all the other circumstances in evidence surrounding the making of the statement.

Of course, any such statement should not be considered in any way whatever as evidence with respect to any other Defendant on trial.

In this case the Governemnt called as one of its witnesses an accomplice with whom the Government has entered into a plea agreement. Such plea bargaining, as

it's called, has been approved as lawful and proper, and is expressly provided for in the rules of this Court.

An accomplice, including one who has entered into a plea agreement with the Government, does not thereby become incompetent as a witness. On the contrary, the testimony of such a witness may alone be of sufficient weight to sustain a verdict of guilty. However, the jury should keep in mind that such testimony is always to be received with caution and weighed with great care. You should never convict a Defendant upon the unsupported testimony of an alleged accomplice unless you believe that testimony beyond a reasonable doubt; and the fact that an accomplice has entered a plea of guilty to the offense charged is not evidence, in and of itself, of the guilt of any other person.

The testimony of an alleged accomplice, and the testimony of one who provides evidence against a Defendant as an informer for pay or for immunity from punishment or for personal advantage or vindication, must always be examined and weighed by the jury with greater care and caution than the testimony of ordinary witnesses. You, the jury, must decide whether the witness' testimony has been affected by any of those circumstances, or by his interest in the outcome of the case, or by prejudice against the defendant, or by the benefits that he has received either financially, or as a result of being immunized from prosecution; and, if you determine that the testimony of such a witness was affected by any one or more of thos factors you should keep in mind that such testimony is always to be received with caution

and weighed with great care.

You should never convict any Defendant upon the unsupported testimony of such a witness unless you believe that testimony beyond a reasonable doubt.

You will note that the indictment charges in each count that the offenses were committed "on or about" a certain date. The proof need not establish with certainty the exact date of the alleged offense. It is sufficient if the evidence in the case establishes beyond a reasonable doubt that the offense was committed on a date reasonable near the date alleged.

The word "knowingly," as that term has been used from time to time in these instructions, means that the act was done voluntarily and intentionally and not because of mistake or accident.

The word "willfully," as that term has been used from time to time in these instructions, means that the act was committed voluntarily and purposely, with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or disregard the law.

To act or participate willfully means to act or participate voluntarily and intentionally, and with specific intent to do something the law forbids, or with specific intent to fail to do something the law requires to be done; that is to say, to act or participate with the bad purpose either to disobey or to disregard the law. So, if a defendant, or any other person, with understanding of the unlawful character or a plan, knowingly encourages, advises or assists, for the purpose of furthering the undertaking or scheme, he

thereby becomes a willful participant - a conspirator.

The guilty of an accused in a criminal case may be established without proof that he personally did every act constituting the offense alleged. The law recognizes that, ordinarily, anything a person can do for himself may also be accomplished by him through direction of another person as his agent, or by acting in concert with, or under the direction of, another person or persons in a joint effort or enterprise.

Title 18, United States Code, Section 2 provides:

> "Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal."

"Whoever willfully causes an act to be done, which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

So, if the acts or conduct of an agent, employee or other associate of the Defendant are willfully directed or authorized by him, or if the Defendant aids and abets another person by willfully joining together with such person in the commission of a crime, then the law holds the Defendant responsible for the acts and conduct of such other persons just as though he had committed the acts or engaged in such conduct himself.

Notice, however, that before any Defendant may be held criminally responsible for the acts of others it is necessary that the accused willfully associate him-

self in some way with the criminal venture, and willfully participate in it as he would in something he wishes to bring about; that is to say, that he willfully seek by some act or omission of his to make the criminal venture succeed.

Of course, mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish that a Defendant either directed or aided and abetted the crime unless you find beyond a reasonable doubt that the Defendant was a participant and not merely a knowing spectator.

In other words, you may not find any Defendant guilty unless you find beyond a reasonable doubt that every element of the offense as defined in these instructions was committed by some person or persons, and that the defendant willfully partici-

pated in its commission.

The law recognizes two kinds of possession: actual possession and constructive possession. A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it.

A person who, although not in actual possession, knowingly has both the power and the intention, at a given time, to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.

The law recognizes also that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.

You may find that the element of possession as that term is used in these instructions is present if you find beyond reasonable doubt that the Defendant had actual or constructive possession, either alone or jointly with others.

During the course of the trial, as you know from the instruction I gave you at the time, testimony or evidence was received with respect to certain alleged transactions involving the distribution of other drugs or narcotics. Such alleged transactions do not constitute the offense charged in the indictment to this case, but would, at most, constitute evidence of "similar acts" in relation to those aleged in the indictment.

Evidence that an act was done at one time, or on one occasion, is not any evidence or proof whatever that a similar act

was done at another time, or on another occasion. That is to say, evidence that a Defendant may have commited an act similar to the acts alleged in the indictment may not be considered by the jury in determining whether the accused in fact committed any act charged in the indictment.

Nor may evidence of some other act of a like nature be considered for any other purpose whatever, unless the jury first find that the other evidence in the case, standing alone, establishes beyond a reasonable doubt that the accused did the particular act charged in the particular count of the indictment then under deliberation.

If the jury should find beyond a reasonable doubt from other evidence in the case that the accused did the act charged in the particular count under delibera-

tion, then the jury may consider evidence as to an alleged act of like nature, in determining the state of mind or intent with which the accused did the act charged in a like nature is established by evidence which is clear and conclusive, the jury may, but is not obliged to, draw the inference and find that, in doing the act charged in the particular count under deliberation, the accused acted willfully, and not because of mistake or accident or other innocent reason.

A defendant who wishes to testify is a competent witness; and the defendant's testimony is to be judged in the same way as that of any other witness.

The law does not compel a defendant in a criminal case to take the witness stand and testify, and no presumption of guilt may be raised, and no inference of any

kind may be drawn, from the failure of a defendant to testify.

As stated before, the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

The testimony of a witness may be discredited or impeached by showing that the witness has been convicted of a felony, that is, of a crime punishable by imprisonment for a term of years. Prior conviction does not render a witness incomptent to testify, but is merely a circumstance which you may consider in determining the credibility of the witness. It is the province of the jury to determine the weight to be given to any prior conviction as impeachment.

A witness may be discredited or impeached by evidence that the general reputa-

tion of the witness for truth and veracity is bad in the community where the witness now resides, or has recently resided.

If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

The jury will also bear in mind that the law never imposes on a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

You are instructed that Title 21, United States Code, Section 822 provides in pertinent part:

(a) Every person who manufactures, distributes, or dispenses any controlled substance or who proposes to engage in the manufacture, distribu-

tion, or dispensing of any controlled substance, shall obtain annually a registration issued by the Attorney General in accordance with the rules and regulations promulgated by him.

(b) Persons registered by the Attorney General under this subchapter to manufacture, distribute, or dispense controlled substances are authorized to possess, manufacture, distribute, or dispense such substances (including any such activity in the conduct of research) to the extent authorized by their registration and in conformity with the other provisions of this subchapter.

Exceptions

(c) The following persons shall not be required to register and may lawfully possess any controlled substance under

this subchapter:

> ...(3) An ultimate user who possesses such substance for a purpose specified in section 802(25) of this title.

You are also instructed that Title 21, United States Code Section 802(25) states:

> (25) The term "untimate user" means a person who has lawfully obtained, and who possess, a controlled substance for his own use or for the use of a member of his household or for an animal owned by him or by a member of his household.

The burden of proof in a criminal case is always on the prosecution and never shifts to the Defendant. The prosecution must prove every essential element of the crime charged in the indictment beyond a reasonable doubt. The Defendants claim to be ultimate users as that term is de-

fined herein. The prosecution must prove beyond a reasonable doubt that the Defendants were not ultimate users. If the Government has failed to meet such burden of proof as to each or all of the Defendants, then you must acquit such Defendant or Defendants.

It is charged in Count 1 of the indictment that:

1. From on or about March 30, 1983, and continuously thereafter up to and including April 8, 1983, in the Northern District of Texas, and elsewhere, WILLIAM THOMAS ROBINSON, also known as Sonny Robinson, JERRY DWAIN WILLIAMS, and AVERY ROGERS, defendants, knowingly and intentionally did combine, conspire, confederate and agree together, and with each other and with other persons, known and unknown to the Grand Jury, to commit

offenses against the laws of the United States, to wit, to knowingly and intentionally possess with intent to distribute and to distribute dilaudid, a Schedule II controlled substance, violations of Title 21, United States Code, Section 841(a)(1).

2. On or about the dates hereinafter mentioned, the following acts were committed in furtherance of said conspiracy and to effect the objects thereof:

OVERT ACTS

1. On or about March 30, 1983, JERRY DWAIN WILLIAMS had a telephone conversation with Pam Williams in which he told her that he had 2,000 sold but that A's man had made a purchase the previous week and could only take 500 on Friday.

2. On or about March 30,. 1983, JERRY DWAIN WILLIAMS had a telephone conversation with Pam Williams in which he told

her he had been talking to AVERY.

3. On or about April 4, 1983, AVERY ROGERS had a telephone conversation with Pam Williams in which he told her to tell Jerry not to come until Friday.

4. On or about April 4, 1983,JERRY DWAIN WILLIAMS had a telephone conversation with Pam Williams in which he said he had talked with Sonny Robinson and then inquired if anyone had called him. Pam Williams told JERRY DWAIN WILLIAMS that AVERY had called and had said that it would be Friday. JERRY DWAIN WILLIAMS then asked if AVERY had said how many and Pam Williams replied that he had not.

5. On or about April 5, 1983, JERRY DWAIN WILLIAMS had a telehone conversation with Pam Williams in which he told her to call that man after seven and tell him everything was set to go on the horse

deal for Thursday night or Friday morning and the amount was good and that they will want more horses the following week. He further told Pam Williams to tell him that it had to be Thursday or Friday because Avery's wife was in the hospital.

6. On or about April 5, 1983, after seven o'clock, Pam Williams had a telephone conversation with WILLIAM THOMAS ROBINSON in which she told him that Jerry would be coming in and they would go together and that Friday would be better because the wife of one of the guys was in the hospital.

7. On or about April 7, 1983, JERRY DWAIN WILLIAMS had a telephone conversation with Pam Williams in which he told her to make airline reservations for him from Amarillo to Dallas/Fort Worth and then to Tulsa. He further told her to

deal for Thursday night or Friday morning and the amount was good and that they will want more horses the following week. He further told Pam Williams to tell him that it had to be Thursday or Friday because Avery's wife was in the hospital.

6. On or about April 5, 1983, after seven o'clock, Pam Williams had a telephone conversation with WILLIAM THOMAS ROBINSON in which she told him that Jerry would be coming in and they would go together and that Friday would be better because the wife of one of the guys was in the hospital.

7. On or about April 7, 1983, JERRY DWAIN WILLIAMS had a telephone conversation with Pam Williams in which he told her to make airline reservations for him from Amarillo to Dallas/Fort Worth and then to Tulsa. He further told her to

make airline reservations for him from Amarillo to Dallas/Fort Worth and then to Tulsa. He further told her to tell Sonny they would meet at the airport and go from there.

8. On or about April 7, 1983, Pam Williams had a telephone conversation with WILLIAM THOMAS ROBINSON in which she told him that he was to meet Jerry at Dallas/ Fort Worth Airport and then fly to Tulsa together. WILLIAM THOMAS ROBINSON replied that would be okay and then received the flight information from Pam Williams.

9. On or about April 7, 1983 JERRY DWAIN WILLIAMS had a telephone conversation with Pam Willims in which she stated she had called Sonny, and JERRY DWAIN WILLIMS told her to call Avery and tell him what's happening.

10. On or about April 7, 1983, Pam

Williams had a telephone conversation with AVERY ROGERS in which she told him that Jerry would be up the following day at 3:50 p.m. on American Airlines. AVERY ROGERS responded okay and to tell Jerry it was only for one and that the other two or more would go the next Tuesday or Wednesday.

11. On or about April 8, 1983, JERRY DWAIN WILLIAMS flew from Amarillo, Texas, to Dallas/Fort Worth Airport and met WILLIAM THOMAS ROBINSON.

12. On or about April 8, 1983, JERRY DWAIN WILLIAMS carried in his pocket, American Airline tickets for Sonny Robinson and himself from Dallas/Fort Worth to Tulsa, Oklahoma.

13. On or about April 8, 1983, WILLIAM THOMAS ROBINSON carried in his boots, approximately 1,000 tablets of dilaudid.

14. On or about April 8, 1983, AVERY ROGERS went to the airport in Tulsa, Oklahoma, to meet JERRY DWAIN WILLIAMS.

A violation of Title 21, United States Code, Section 846.

Section 846 of Title 21, United States Code, provides that:

> "Any prson who attempts or conspires to commit any offense defined in this subchapter [is guilty of an offense against the United States.]"

Section 841(a)(1) of Title 21, United States Code is within the same subchapter as Section 846 above, and provides that:

> "it shall be unlawful for any prson knowing or intentionally -
>
> (1) to ... distribute, ... or possess with intent to ... distribute, ...a controlled substance..."

So, under this law a "conspiracy" is a

combination or agreement of two or more persons to join together to attempt to accomplish some unlawful purpose. It is a kind of "partnership in criminal purposes" in which each member becomes the agent of every other member. The gist or essence of the offense is a combination or mutual agreement by two or more persons to disobey, or disregard, the law.

The evidence in the case need not show that the alleged members of the conspiracy entered into any express of formal agreement; or that they directly stated between themselves the details of the scheme and its object or purpose, or the precise means by which the object or purpose was to be accomplished. Similarly, the evidence in the case need not establish that all of the means or methods set forth in the indictment were in fact agreed upon to

carry out the alleged conspiracy, or that all of the means or methods which were agreed upon were actually used or put into operation. Neither must it be proved that all of the persons charged to have been members of the conspiracy were such, nor that the alleged conspirators actually succeeded in accomplishing their lawful objectives.

What the evidence in Count 1 of the indictment must show beyond a reasonable doubt is:

1. That two or more persons in some way or manner, positively or tacitly, came to a mutual understanding to try to accomplish a common and unlawful plan, as charged in the indictment;
2. That the Defendant willfully became a member of such conspiracy;

3. That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the means or methods (or "overt acts") described in the indictment; and

4. That such "overt act" was knowingly committed at or about the time alleged in an effort to effect or accomplish some object or purpose of the conspiracy.

An "overt act" is any transaction or event, even one which may be entirely innocent when considered alone, but which is knowingly committed by a conspirator in an effort to accomplish some object of the conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some object or purpose of a conspiracy, does not

thereby become a conspirator.

One may become a member of a conspiracy without full knowledge of all of the details of the unlawful scheme or the names and identities of all of the other allege conspirators. So, if a Defendant, with an understanding of the unlawful character of a plan, knowingly and willfully joins in an unlawful scheme on one occasion that is sufficient to convict him for conspiracy even though he had not participated at earlier stages in the scheme and even though he played only a minor part in the conspiracy.

Of course, mere presence at the scene of an alleged transaction or event, or mere similarity of conduct among various persons and the fact that they may have associated with each other, and may have assembled together and discussed common

aims and interest, does not necessarily establish proof of the existence of a conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some object or purpose of a conspiracy, does not thereby become a conspirator.

In your consideration of the conspiracy offense as alleged in the indictment you should first determine, from all of the testimony and evidence in the case, whether or not the conspiracy existed as charged. If you conclude that a conspiracy did exist as alleged, you should next determine whether or not the Defendant under consideration willfully became a member of such conspiracy.

In determining whether a Defendant was a member of an alleged conspiracy, however, the jury should consider only that

evidence, if any pertaining to his own acts and statements. He is not responsible for the acts or declarations of other alleged participants until it is established beyond a reasonable doubt, First, that a conspiracy existed and Second, from evidence of his own acts and statements, that the Defendant was one of its members.

On the other hand, if and when it does apear beyond a reasonable doubt from the evidence in the case that a conspiracy did exist as charged, and that the Defendant under consideration was one of its members, then the statements and acts knowingly made and done during such conspiracy and in furtherance of its objects, by an other proven member of the conspircy, may be considered by the jury as evidence against the Defendant under consideration

even though he was not present to hear the statement made or see the act done.

This is true because, as stated earlier, a conspiracy is a kind of "partnership" so that under the law each member is an agent or partner of every other member, and each member is bound by or responsible for the acts and statements of every other member made in pursuance of their unlawful scheme.

It is charged in Count 2 of the indictment that:

On or about April 8, 1983, in the Fort Worth Division of the Northern District of Texas, ILLIAM THOMAS ROBINSON and JERRY DWAIN WILLIAMS, defendants, knowingly and intentionally did possess with the intent to distribute, approximately 1,000 tablets of dilaudid, a Schedule II controlled substance.

A violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.

Section 841(a)(1) of Title 21, United States Code, provides in pertinent part as follows:

"[I]t shall be unlawful for any person knowingly or intentionally ----

(1) to ... possess with intent to ... distribute, a controlled substance..."

Dilaudid is a controlled substance within the meaning of the law.

In order to establish the offense proscribed by that statute the Government must prove each of the following elements beyond a reasonable doubt:

First: That the Defendant knowingly and willfully possessed dilaudid as charged; and

Second: That he possessed the substance

with the intent to distribute it.

To "possess with intent to distribute" simply means to possess with intent to deliver or transfer possession of a controlled substance to another person, with or without any financial interest in the transaction.

The law permits the jury to find the accused guilty of any lesser offense which is necessarily included in the crime charged in the indictment, whenever such a course is consistent with the facts found by the jury from the evidence in the case, and with the law as given in the instructions of the Court.

So, if the jury should unanimously find the accused William Thomas Robinson, also known as Sonny Robinson, "Not Guilty" of the crime charged in Count 2 of the indictment, then the jury must proceed to

determine the guilt or innocence of the accused as to any lesser offense which is necessarily included in the crime charged.

The crime of possession with intent to distribute approximately 1,000 tablets of dilaudid, a Schedule II controlled substance, as charged in the indictment necessarily includes the lesser offense of possession of a controlled substance, to wit: approximately 1,000 dilaudid tablets, unless the possessor is an ultimate user as that term has been defined herein.

With respect to the offense charged in Count 2 of the indictment, then, if the jury should find the accused William Thomas Robinson, also known as Sonny Robinson, not guilty as charged, the jury must proceed to determine whether the accused, William Thomas Robinson, also known as Sonny Robinson, is guilty or not

guilty of the lesser included offense of possession of a controlled substance without being an ultimate user as that term has been defined.

As stated before, the burden is always on the prosecution to prove every essential element of the crime charged beyond a reasonable doubt. The law never imposes upon a Defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

It is charged in Counts 3 through 8 of the indictment that:

COUNT 3

On or about April 5, 1983, in the Fort Worth Division of the Northern District of Texas, WILLIAM THOMAS ROBINSON, defendant, knowingly and intentionally did use a communication facility, that is, a telephone, in facilitating the knowing and intentio-

nal possession with intent to distribute by WILLIAM THOMAS ROBINSON and JERRY DWAIN WILLIAMS of dilaudid, a Schedule II controlled substance, a felony under Title 21, United States Code, Section 841(a)(1), in that WILLIAM THOMAS ROBINSON used the telephone to receive information regarding when he and JERRY DWAIN WILLIAMS would get together to take dilaudid to AVERY ROGERS.

A violation of Title 21, United States Code, Section 843(b), and Title 18, United States Code, Section 2.

COUNT 4

On or about April 7, 1983, in the Fort Worth Division of the Northern District of Texas, WILLIAM THOMAS ROBINSON, defendant, knowingly and intentionally did use a communication facility, that is, a telephone, in facilitating the knowing and intentional possession with intent to distribute

by WILLIAM THOMAS ROBINSON and JERRY DWAIN WILLIAMS of dilaudid, a Schedule II controlled substance, a felony under Title 21, United States Code, Section 841(a)(1), in that WILLIAM THOMAS ROBINSON used the telephone to agree to meet JERRY DWAIN WILLIAMS at Dallas/Fort Worth Airport and then fly with him to Tulsa, Oklahoma, to deliver dilaudid.

A violation of Title 21, United States Code, Section 843(b), and Title 18, United States Code, Section 2.

COUNT 5

On or about April 5, 1983, in the Fort Worth Division of the Northern District of Texas, JERRY DWAIN WILLIAMS, defendant, knowingly and intentionally did use a communication facility, that is, a telephone, in facilitating the knowing and intentional possession with intent to distribute

by WILLIAM THOMAS ROBINSON and JERRY DWAIN WILLIAMS of dilaudid, a Schedule II controlled substance, a felony under Title 21, United States Code, Section 841(a)(1), in that JERRY DWAIN WILLIAMS used the telephone to send instructions to WILLIAM THOMAS ROBINSON that their deal to take dilaudid to AVERY ROGERS was set to go on Thursday or Friday.

A violation of Title 21, United States Code, Section 843(b), and Title 18, United States Code, Section 2.

COUNT 6

On or about April 7, 1983, in the Fort Worth Division of the Northern District of Texas, JERRY DWAIN WILLIAMS, defendant, knowingly and intentionally did use a communication facility, that is, a telephone, in facilitating the knowing and intentional possession with intent to distribute

by WILLIAM THOMAS ROBINSON and JERRY DWAIN WILLIAMS of dilaudid, a Schedule II controlled substance, a felony under Title 21, United States Code, Section 841(a)(1), in that JERRY DWAIN WILLIAMS used the telephone to send instructions to make airline reservations for him from Amarillo to Dallas/Fort Worth and then to Tulsa in order to take dilaudid to AVERY ROGERS.

A violation of Title 21, United States Code, Section 843(b), and Title 18, United States Code, Section 2.

COUNT 7

On or about April 4, 1983, in the Fort Worth Division of the Northern District of Texas, AVERY ROGERS, defendant, knowingly and intentionally did use a communication facility, that is, a telephone, in facilitating the knowing and intentional possession with intent to distribute by WILLIAM

THOMAS ROBINSON and JERRY DWAIN WILLIAMS of dilaudid, a Schedule II controlled substance, a felony under Title 21, United States Code, Section 841(a)(1), in that AVERY ROGERS used the telephone to send instructions to JERRY DWAIN WILLIAMS to not bring the dilaudid to him until Friday.

A violation of Title 21, United States Code, Section 843(b), and Title 18, United States Code, Section 2.

COUNT 8

On or about April 7, 1983, in the Fort Worth Division of the Northern District of Texs, AVERY ROGERS, defendant, knowingly and intentionally did use a communication facility, that is, a telephone, in facilitating the knowing and intentional possession with intent to distribute by WILLIAM THOMAS ROBINSON and JERRY DWAIN WILLIAMS

of dilaudid, a Schedule II controlled substance, a felony under Title 21, United States Code, Section 841(a)(1), in that AVERY ROGERS used the telephone to telephone to receive information regarding when he was to meet JERRY DWAIN WILLIAMS at the Tulsa airport and receive the dilaudid.

A violation of Title 21, United States Code, Section 843(b), and Title 18, United States Code, Section 2.

Section 843(b) of Title 21, United States Code, provides in pertinent part that:

> "It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision [of the fed-

eral drug laws]."

"Communication facility" as used in this section, includes the use of a telephone.

In order to establish the offense proscribed by that statute, the Government must prove each of the following elements beyond a reasonable doubt:

First: That the Defendant knowingly and intentionally used the telephone.

Second: That such use of the telephone was with the intent to facilitate the offense of possession of dilaudid with the intent to distribute.

The defendant is not on trial for any act or conduct not alleged in the indictment.

Upon retiring to the Jury Room, you will select one of your number to act as foreperson. The foreperson will preside

over your deliberations and be your spokesperson in court.

Form of verdict has been prepared for your convenience.

You will take this form to the Jury Room and when you have reached unanimous agreement as to your verdict, you will have your foreperson fill in, date, and sign the form to state the verdict upon which you agree, and then return with your verdict to the courtroom.

If if becomes necessary during your deliberations to communicate with the Court, you may send a note by the bailiff. Never attempt to communicate with the Court except in writing. And bear in mine always that you are not to reveal to the Court or any person how the jury stands, numerically, or otherwise, on the question of the guilt or innocence of the accused,

until after you have reached a unanimous verdict.

It is proper to add the caution that nothing said in these instruction -- nothing in any form of verdict prepared for your conveneience -- is to suggest or convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is the sole and exclusive duty and responsibility of the jury.

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

You are not partisans. You are judges -- judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

The punishment provided by law for the offense charged in the indictment is a matter exclusively within the province of the Court, and is not to be considered by the jury in arriving at an impartial verdict as to the guilt or innocence of the accused.

SIGNED this_____day of_____, 1985.

_____
DAVID O. BELEW, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX F

JURY NOTE

TO THE HONORABLE JUDGE:

We are in trouble on a technical point of "intent".

Some want to know how, in the case of William Thomas Robinson, can we decide, should we do so, to find said Robinson "not guilty" on point #2, to act on Jerry Williams when, in fact, there would be evidence if the pills had not changed hands?

S/Harry Skaggs
Foreperson

4-23-84
12:15 P.M.

APPENDIX G

COURT'S REPLY TO JURY

April 23, 1984

12:30 P.M.

MEMBERS OF THE JURY:

All I can do is ask you to carefully reread the Court's instructions and definitions and recall the evidence as it pertains to each individual defendant.

S/David O. Belew
UNITED STATES DISTRICT JUDGE

APPENDIX H

(The following bench conference was had:)

MR. STEPHENS: The testimony to be elicited from Mr. McCuistion will involve three extraneous offenses relating to Jerry Williams in 1983, in March, February and January, the three preceding months before this, or one of the months this conspiracy began. In addition to that, he will have testimony in the nature of a statement made by a co-conspirator, Jerry Dwain Williams during the course of the conspiracy and in furtherance of the conspiracy that we'll introduce as to all three defendants, asking for a James hearing or a James ruling just prior to then. But first we'd do the three extraneous offenses against --

THE COURT: What are those offenses?

MR. STEPHENS: In March of 1983 has to

do with the loaning of $5,000 to Mr. Williams to purchase cocaine and to pay off an old debt for cocaine that they had purchased, and that it was -- it was brought in by Mr. Williams and that Mr. McCuistion sold at least part of it for Mr., Williams. The second one is the preceding month in February that --

THE COURT: Do you know about those, Beale?

MR. DEAN: I've just --

MR. STEPHENS: We've talked.

MR. DEAN: I've read what they've talked about I don't --

MR. STEPHENS: I gave him a 302. That Mr. McCuistion met Mr. Williams at the airport in Amarillo the following day went up to the hotel with him, was shown 5 to 6

ounces of cocaine and was aked if he could help move it an in fact he did, for Williams. And then the preceding month was the month he first met him in Weatherford, Texas, wound up getting marijuana from him there taking it back up to Amarillo to sell, all from Williams.

MR. DEAN: Your Honor, those three extraneous offenses can't possibly be probative of the -- what he's indicted for. They precede the conspiracy, they don't deal with the substantive counts which have to do with possession of dilaudid.

THE COURT: Well, it's a controlled substance. I think it's similar enough that --

MR. DEAN: Certainly the prejudicial effect of that, I don't think it's got any probative value. But the prejudicial effect of those, that proof is going to

far outweigh any --

THE COURT: Think we ought to excuse the jury till 2 o'clock and let's get all this stuff straightened out once and for all.

MR. STEPHENS: We could get right on with this. I don't know if there's any reason to do that --

MR. ETHINGTON: Judge, we'd like to make a full argument to the Court on the, whether or not it's admissible as to the other two defendants. We've got ...

THE COURT: I think we better just do it and clear it and get -- we can't mumble it.

MR. STEPHENS: Argue it like we did the other one.

THE COURT: Let's get the whole record and protect themselves.

MR. STEPHENS: Okay.

THE COURT: Wait a minute now before we go, let's see what other problem might we have.

MR. STEPHENS: The witness after that is a pharmacist.

THE COURT: Is that all?

MR. STEPHENS: And then we're going to rest.

THE COURT: All right.

(End of bench conference.)

THE COURT: All right. Let the record show that the United States Attorney approached the bench with counsel and stated generally what the next witness was going to testify to, but to give everybody an opportunity to fully understand what the testimony is going to be and what objections, if any, they want to make, we have recessed the jury to go into this matter fully, and I will now let Mr. Stephens

make a statement as to what he intends to prove by -- what's the witness? By McCuistion.

MR. STEPHENS: Yes, Your Honor, Terry McCuistion.

THE COURT: Okay.

MR. STEPHENS: As to Jerry Williams only, we intend to elicit testimony having to do with three prior -- three extraneous offenses prior to that alleged in the indictment. The first being in the month of March, 1983 which is the month first alleged in the indictment.

THE COURT: What did he do then supposedly?

MR. STEPHENS: On that one, it has to do with cocaine, that he loaned $5,000 to Mr. Jerry Williams for the purpose of paying off what had been owed for cocaine that they had obtained and sold, as well

as to get more cocaine to sell, and that, in fact, after the loan Mr. Williams did come back with more cocaine, and that Mr. McCuistion did receive some of it from Mr. Williams and sell it in the month of March.

Then in the preceding month of February, that Mr. McCuistion met Mr. Williams at the airport in Amarillo, gave him a ride to his hotel the next morning, met with him where he was shown by Mr. Williams a quantity of cocaine, and Mr. Williams asked him if he thought he could move it, he said he could, or thought he could, and did sell some of it. The third one backs up to the month before that in January, the first month that Mr. McCuistion met Jerry Williams, and that he met him in Weatherford, Texas, and during the time he was in Weatherford he received a

quantity of marijuana from Mr. Williams and took it back to Amarillo and did sell it there in Amarillo.

THE COURT: All right. What's the purpose of this testimony and what's it being offered for?

MR. STEPHENS: Its being offered as to Mr. Williams only to show his knowledge and intent in these transactions, exactly the same argument I made previously has to do with Avery Rogers, to fill in the elements of intent, knowlege, motive of the overall case of possession with the intent to distribute, that he did have this intent because this is the kind of business and what he was up to during that period of time.

THE COURT: It has nothing to do with conspiracy?

MR. STEPHENS: Well, it would have to

do with the conspiracy on him because of his knowledge in the conspiracy also, only to that element of knowledge and intent.

THE COURT: All right.

MR. STEPHENS: And then there's one other area we intend to elicit from Mr. McCuistion, and that would be after requesting a finding from the Court pursuant to James that the statement was made during the course of the conspiracy in furtherance of the conspiracy by a conspirator, and that would be a statement made in the time frame of April -- between April the 6th and 8th.

THE COURT: Who made this statement?

MR. STEPHENS: A statement by Jerry Williams to Terry McCuistion to the effect that they were talking about the bad financial shape they were in, or that Mr. Williams was in, hurting for money, things

weren't going well for them in their business, and that Mr. Williams told Mr. McCuistion that he had arranged a deal for Sonny Robinson to supply Avery Rogers with the dilaudid. That Sonny Robinson would be getting money out of this and would make things well again for him so they in turn could start getting their supply of narcotics going again and everything would be all right for them after that, and that he, in fact, did tell him he was going to D/FW to meet and take the stuff, dilaudid, to Avery Rogers.

THE COURT: All right. Who wants to object first?

MR. DEAN: Well, Your Honor, I want to say this, that the only one of those four proffers of testimony that could even arguable be admissible would be the one about April the 6th to April the 8th, the

so-called, the recorded conversation about supplying Rogers with dilaudid. The January, February and March conversations obviously don't have anything to do with either the substantive counts in the indictment against Williams or the conspiracy. They're not within the -- they not only are not within the time period of the conspiracy, and not within the furtherance of the conspiracy, they involve completely extraneous offenses, as Mr. Stephens admits, they're -- if you credit that testimony, having marijuana in Weatherford and giving it to him in January, showing him cocaine in February, and this business about the $5,000 loan in March to pay a prior cocaine debt, that has nothing to do with dilaudid, it has nothing to do with any alleged common agreement between the conspirators. It's completely extra-

aneous --

THE COURT: He's not offering it to show any conspiracy, he's just offering it to show this man's intent.

MR. DEAN: Well, if it shows that, the only knowledge and intent it shows is knowledge and intent, if it shows any, is knowledge and intent with respect to giving him marijuana and cocaine or borrowing money to pay a cocaine debt, and that's not what he's charged with. Now, he hasn't testified in this case, he's not going to take the stand.

THE COURT: Doesn't make any difference whether he's testified or not. If it's relevant, the government can offer it, as I read the rule.

MR. DEAN: It's not relevant to show the commission of the offense, the offense with which he's charged.

MR. STEPHENS: That's right. And the judge would instruct under the similar offense, I mean that's part of the Court's instructions.

THE COURT: Yes.

MR. DEAN: Keep in mind, too, Your Honor, that McCuison has not been indicted as -- and not been named as a co-conspirator in this case.

THE COURT: I think the similarity is that he's dealing in a controlled substance. It's like a fellow is charged with robbing a bank, and you -- there's an extraneous offense where he robbed a grocery store, and just because it's a bank and a grocery store, it's still robbery.

MR. DEAN: Judge, Rule 404-B is squarly on point. It says evidence of other crimes, wrongs or acts are not admissible to prove the character of the person to

show that he acted in conformity therewith.

THE COURT: That's right. But -- well, looks to me like the only dissimilarity really is the drug involved. Well, I will let you make your objections now. I'm going on the same basis, admitting it under the Beechum --

MR. DEAN: We understood, Your Honor, we can have that objection to that testimony when it's -- if and when it's proffered before the jury without the necessity of getting up and making it again.

THE COURT: All right, that's right. The objections you make now and the objections that were made to the testimony of Mr. Cooper will be carried forward and will be treated as though you remade those objections and any additional objections you might make now, as though you made

them at the time the testimony was offered by Mr. McCuistion. And I am going to instruct the jury that it only applies to Mr. Williams, and I will also give them this instruction I gave on -- has McCuistion been convicted of a felony?

MR. STEPHENS: Yes, sir. He's entered a plea of guilty.

THE COURT: I'll instruct them on that as to weight and credibility, and I'll also instruct them on similar acts that I did before. Okay, Jerry.

MR. LOFTIN: Your Honor, we would reurge, if the Court's ruling is that this testimony be elicited as to extraneous offenses in January, February, March, under the same motion that we previously filed, we would ask again that we be granted a severance in this trial for the elicitation of this testimony. It has --

marijauna is not a controlled substance, and it doesn't even fall in the category of dilaudid. It's not a scheduled controlled substance. So the January possession or alleged conversations about marijuana have nothing to do of probative value with a conspiracy that's some three or four months later for a very brief period of time. And we feel that that is so highly prejudicial that no charge that the Court can give will remove that if we're convicting somebody of being a bad person, so we would ask the court to sever us from this trial at this time, reurge that based on the ruling of the Court in that regard.

THE COURT: Okay. I overrule the motion, and you all can each have the benefit of Mr. Loftin's motion for severance and the objections that were made to

Cooper's testimony, the objections that are being made to the testimony that is going to be elicited from Mr. McCuistion. Go ahead, Jerry.

MR. ETHINGTON: Judge, on page 4 of a report that has been given to us by the government, if I could approach the bench?

THE COURT: You may.

MR. ETHINGTON: Gives us the substance of what some other testimony would be from McCuistion that is underlined there for the Court's benefit as to what McCuistion says Williams said regarding Rogers. Clearly before a hearsay statement is admissible, it has to be uttered by an alleged co-conspirator. The government meets that first burden. They've alleged Williams as a co-conspirator. During the pendency of the conspiracy, and there it says it's in the first week of April which

puts us in the indictments time period, and the third test clearly is it must be in furtherance. Furtherance means somehow aids in achieving the goal of the conspiracy. William's comments to McCuistion are in no way soliciting McCuistion to join the conspiracy; McCuistion has not been named as a co-conspirator either in the indictment or the response to the bill of particulars; that statement is not in furtherance of the conspiracy. It's casual conversation, as the courts say, casual conversation between a co-conspirator and some third party. Since it's not in furtherance of any goal listed in the conspiracy.

Now, the government might say, well, yeah, it's a status report to McCuistion, McCuistion not being in the conspiracy, there's never been suggested that he was

being solicited to join the conspiracy. This is activity outside the conspiracy not in furtherance, and we ask it be excluded from the Rogers and Robinson case.

THE COURT: All right. Let me read the statement you're talking about. On page 4 of the FBI report where it states, quote: McCuistion said that in approximately the first week of April, 1983, Williams told him he was making a deal for Avery to buy dilaudid tablets from Sonny Robinson and that Williams was going with Sonny Robinson to deliver the dilaudid tablets to Avery at Tulsa, Oklahoma.

That's the testimony you're objecting to, is that right, Jay?

MR. ETHINGTON: As not being in furtherance.

THE COURT: All right. Okay. Well, first I'm going to have find that there's

been substantial evidence of a conspiracy before it has any application, and somewhere we're going to have to discuss that little matter. And where are we going to have that little discussion?

MR. STEPHENS: Now is fine with me, if you want.

THE COURT: What?

MR. STEPHENS: Now is fine with me, or just before we start this.

THE COURT: Well, do you want to stop the trial and excuse the jury for that?

MR. STEPHENS: Or do it just after the lunch break and before they come in, or whatever time you find.

THE COURT: All right.

MR. STEPHENS: Or now or --

THE COURT: All right. Before you offer that, are you going to ask that I make the finding that there has been a

conspiracy?

MR. STEPHENS: Yes, sir.

THE COURT: All right. Then you'll have a chance again. We are going to have to decide whether or not here has been a conspiracy proved up to this point by other matters. All right. Now I am going to -- do you have any further objections now to -- anybody as to the testimony that McCuistion is going to give us to these three extraneous acts in January, February and March?

MR. DEAN: Well, the objection I think is stated.

THE COURT: All right.

MR. DEAN: I don't -- they are extraneous, I don't think they're properly admissible to prove knowledge or intent of the indictment, the charges made against him in the indictment, and I think the --

there's no doubt in my mind that the prejudice involved to my client far outweighs the probative value, if it's got any.

THE COURT: All right. Each of you can have the benefit of that, and I overrule the objection.

MR. LOFTIN: May I make one more objection, Your Honor?

THE COURT: All right.

MR. LOFTIN: Under the constitution and the code of Federal Rules of Procedure, we are -- have a right to be placed on notice of the charges that we defend. By allowing the government to come in at this point in time and allege three extraneous offenses that occurred, by their own testimony outside the conspiracy, does not place us on notice to prepare an adequate defense in the cross-examination of this

individual, and for this reason we would ask, if the Court's ruling is that these are admissible, a continuance at this point in time to give us an opportunity to properly prepare for the cross-examination of Mr. McCuistion and to bring other testimony to show that this is impeachable. In other words by them coming up now saying, well, we've got three other things, it denies us an opportunity to be effective counsel and assist in the defense of our clients. It denies us an opportunity to be placed on notice as to what these particular offenses are as to dates and times. And it does not offer us, afford us an opportunity at 12 o'clock in the afternoon to reconvene testimony so that we could adequately prepare a defense to these allegations. So we would ask to continue.

THE COURT: What has McCuistion been convicted of? Conspiracy to distribute cocaine.

THE COURT: Is that all? Just one conviction?

MR. STEPHENS: That I convicted him of. Was there some more back there? There was an old conviction having to do several years ago. Oh, you're talking about McCuistion, I'm sorry. The one conviction of use of telephone to facilitate cocaine in that conversation with Mr. Williams.

THE COURT: All right. Have you let the defendants' counsel see your file on this case?

MR. STEPHENS: Yes, sir, that's where they got what they just gave you.

THE COURT: And how long ago did they know that these men might testify, and what their testimony might be?

MR. STEPHENS: They've been on the witness list since that last trial. When was that -- several months ago.

THE COURT: When Whiteley didn't show up?

MR. STEPHENS: Yes, sir. They've been on the witness list.

THE COURT: Where is McCuistion?

MR. STEPHENS: He's here in the courthouse.

THE COURT: Is he a free man, or is he in the penitentiary?

MR. STEPHENS: He's free, yes.

THE COURT: All right. I'm going to let you all, if you haven't already --

MR. LOFTIN: May it please the Court. We just received this yesterday. The fact that he's on a witness list does not place us on notice of these three offenses. We did not receive until yesterday this FBI

investigative report that made these allegations, and, of course, we had no way of knowing what the ruling of the Court would be, but his was not received in our hands until yesterday. So we certainly haven't had time sitting in trial and working in the evenings on our defense to attempt to determine --

THE COURT: All right. I'll lot -- I'll get you to get -- have you all talked to McCuistion?

MR. LOFTIN: No, sir.

THE COURT: I'm going to give you an opportunity to meet where ever, we'll provide a place for you to meet and interrogate him before he's put on the stand and find out what his story is. Is the marshal's office all right?

MR. ETHINGTON: Judge, they have a real nice office in the U.S. Attorney's Office.

Since he's a free man, Mr. Stephens has got very comfortable large office that would be --

MR. STEPHENS; I can make available there or down here in the courtroom.

THE COURT: Well, Mr. Peoples has got a nice office back there, too. Wherever you want to do it.

MR. STEPHENS: I'd like to make use -- Mr. Peoples' office is completely blank in there and wouldn't be obstructed at all got more room. I can have him there just before lunch.

THE COURT: When do you all want to see him and where? You can do it there.

MR. ETHINGTON: I thought maybe Judge Sanders would have Mr. Peoples over here, but I guess he's still in Dallas so I guess we can use his office.

THE COURT: What time do you want to

meet? You know where Peoples' office is, and the Marshal will let you all in. Do you want to do it a 1:30 or do it now or what? Or 1 o'clock?

MR. DEAN: As far as I'm concerned I'd just as soon go ahead and do it now if he's here.

THE COURT: All right.

MR. LOFTIN: Your Honor, may I have a ruling on my motion for continuance.

THE COURT: It's overruled. Thank you for reminding me. Can you get him back there now?

MR. STEPHENS: I think so.

THE COURT: All right. And instruct him to answer the questions.

MR. STEPHENS: Yes, sir.

THE COURT: Okay. 2 o'clock, then. Now, listen, after McCuistion, who is probably not an hour or something, we go

on with this case, he says he's got a pharmacist. What's the pharmacist going to testify to?

MR. STEPHENS: To what dilaudid is and explain it a little bit.

THE COURT: All right. So I don't know what your plans are, but when the time comes to move forward, if it's 4:30 or something, we'll wait till in the morning and give you a chance to sleep on what you want to do, if we have to go forward.

MR. LOFTIN: Your Honor, it's my understanding we recess tomorrow at 12:00, and then we'll reconvene --

APPENDIX I

(Jury Out)

MR. STEPHENS: If I can let the Court know -- and I've let all the defense attorneys interview him also -- let the Court know what we propose to bring through Mr. Cooper. And it would be an extraneous crime, wrong, or act pursuant to 404, Rule 404(b), rules of evidence 404(b). And the gist of that evidence will be against Avery Rogers only, and it's to this effect: That about the third week in April, which makes it about a couple of weeks after the arrest and conclusion of this case that we've been hearing, that Lawice Cooper was in the presence of Avery Roges in the Talequah area. And at that time Mr. Cooper asked Mr. Rogers if he knew where he, Rogers, could get him, Cooper, some cocaine, and

he wasn't able to get him any then --

THE COURT: When Cooper asked Rogers for cocaine?

MR. STEPHENS: Right.

THE COURT: All right.

MR. STEPHENS: And Rogers didn't have any at that time, but in turn Mr. Rogers asked Mr. Cooper do you have any sources of Dilaudid that he could get $27 per tablet for them and that he needed a lot of them and that he needed them in lots of 1,000, if he could. Which is the extraneous act and wrongs that we say under Beechum, under Rule 404(b) is certainly material and is admissible evidence to show intent and knowledge as to Avery Rogers concerning this crime.

THE COURT: Okay. What's --

MR. STEPHENS: Well, then he had a

third meeting within a week after that with Mr. Rogers also at which time Rogers told him that the Feds were after him, that he was hot and that his line was probably tapped and be careful when you call me.

THE COURT: All right. Is that it?

MR. STEPHENS: That's as to Mr. Rogers. Then he will testify that he met Jerry Williams in Amarillo and that was at the suggestion of Mr. Rogers.

THE COURT: Who met Jerry?

MR. STEPHENS: Mr. Cooper went onto Amarillo then after being in the Talequah/ Tulsa area, met Jerry Williams and that was at the instruction or recommendation of Avery Rogers, but we won't go in beyond what all happened there in Amarillo, just that he did meet him.

MR. ETHINGTON: And it is our position,

Your Honor, that his is clearly -- and the government agrees -- an extraneous offense or discussion regarding -- it's not even an offense. It's a discussion regarding a potential offense. It's merely a discussion. Now, they contend that it's admissible under 404(b). Clearly 404(b) - 404 the entire rule, discusses evidence of character traits. And that's the tenor of most of the rule. The very last paragraph says: Evidence of other crimes, wrongs or

> acts -- we don't even have that here, we've got a request or a discussion -- is not admissible to prove character; it may, however, be admissible for other purposes to prove motive, opportunity, intent, preparation -- we have no preparation for anything -- we plan, knowledge, identity or absence of mistake or accident.

Now the arrests ocurred on April 8th. The government alleges that the conspiracy ended on April 8th. This is clearly a separate discussion, separate and apart from these two defendants. The rule used to say to rebut the defensive theory of motive, intent, design, common scheme, or knowledge. There is no common scheme. There has been no defensive theory presented at this time. It's not admissible. It might be admissible in rebuttal if we got that far. It's not admissible at this time clearly, Your Honor, and that's our position. 404 does not provide for it. In fact, 403 says exclusion of testimony because of prejudice, and that's the first word, prejudice, confusion, or waste of time. Prejudice to this defendant, Rogers; confusion as to the co-defendants.

Now, the government pled this case with

co-indictees, they wanted to go to trial with several defendants. Now they want to put in evidence against one defendant only and would rely on a curative instruction which we say the prejudicial effect overweighs the probative value as to the co-defendants. It's confusing, we don't think a jury could separate this testimony to one separate individual defendant. It is outside the scope of the conspiracy, has no relevance, has no relevance to this allegation. We'd object to it Your Honor.

THE COURT: Okay.

MR. LOFTIN: May it please the Court. If the Court will note on one of our motions that is on file, the Court granted the motion on extraneous limiting offenses. In addition to that, if the Court will refer to that one page motion, we will ask that if this testimony is elicit-

ed and if the government elects this testimony, we think we have a right under the severance motion to be severed out of this lawsuit right now under that 82043.B Subsection. And if that testimony -- if the government makes that election in the form of whatever theory they have to bring in extraneous offense outside the conspiracy -- and I think the case law is pretty clear on this, Your Honor, that assuming that there is a conspiracy within this group, and the testimony -- and I think there's some Fifth Circuit opinion on it, that if you have somebody out here that's going to testify as to an extraneousness as to a defendant, then our severance motion whould be granted. We ought to be able to sever out because that testimony is so prejudicial to the system of justice tht we have no way to rebut that. It's--

and I think if you'll note in that motion, it's called barring the testimony. That also is in light of the previous motions we've filed under the severance motions and under the postion that this is extraneous completely to us, and so there's nothing solved as an issue before the trier of facts that this testimony does. It's purely that as a prejudice situation. There's no way we can recover from it, if it's put in, so we would ask the Court, if the Court does allow the government, to go ahead and grant our severance motion at this time.

MR. DEAN: Your Honor, the only thing I would add to that, now Mr. Stephens says he's going to offer this testimony only against Mr. Rogers. I don't think any of us are naive enough to believe that the judge can -- that the jury can sit and

sort in its mind the evidence against Rogers. And in light of the testimony Rogers told him to come down and look up Williams in Amarillo, not have it rebound against my client, too. I don't think the testimony is admissible at all. But if the Court's going to admit it, then I concur with Mr. Loftin. I think we -- Jerry Williams should be severed at this point.

MR. EHTINGTON: For guidance, very briefly, Your Honor, the subdivision does not exclude the evidence when offered was the initial language that the committee who drafted this statute used, and they changed it, according to these notes and the legislative history, too, it may however be admissible. It may be. And that's what you have before you, it may be, and we say that the prejudicial effect of this extraneous discussion outside the

scope of the conspiracy is more prejudicial than it has probative value. Thank you.

THE COURT: What do you say, Mr. Stephens?

MR. STEPHENS: Your Honor, the nature of conspiracy law in itself dictated that you have to bring in independent evidence to show people are members of the conspiracy. And it contemplates evidence about people individually with instructions that applies to them only until they'll all brought into it. So I think the very nature of the conspiracy law contemplates that. It's certainly not any --

THE COURT: Well, this happens after the conspiracy, doesn't it?

MR. STEPHENS: Pardon me?

THE COURT: The conspiracy -- this remark that Rogers made about the Dilaudid

and cocaine or whatever to Cooper was after the conspiracy.

MR. STEPHENS: It was after the conspiracy, but it relates to the whole offense to show his intent and knowledge which is the weak and lacking element, the element that's obviously been contested in this case. That's why it is so relevant and it's so admissible.

THE COURT: If I find that a conspiracy existed, are you going to try to say that this statement that Rogers allegedly made to Cooper goes back to conspiracy?

MR. STEPHENS: It goes to his intent and knowledge. That's what makes it admissible in these prior transactions, judge. That's what Beechum says the it's--

THE COURT: I understand that. How does it affect the conspiracy?

MR. STEPHENS: Only as to his knowledge

of what was going on.

THE COURT: It doesn't have anything to do with the other two people

MR. STEPHENS: No, sir. No, sir. and it's admitted only as to him.

THE COURT: That's what --

MR. STEPHENS: That has -- and -- and the law in Beechum says it's clear before the court even went to trial in that case, crucial issue to the Beechum was intent. Where it's evident that intent is the issue at the trial, we've held the admission of the extrinsic evidence even in the past. And in this case, Beechum, it's not reversible to allow it to come on in the case in chief where issue, intent and knowledge which is clerly the issue in this case and an element in the crime is contested, and it's admissible for that purpose.

MR. ETHINGTON: Very briefly, Your Honor, may I respond?

THE COURT: Yes. Excuse me.

MR. ETHINGTON: Beechum was decided under the language of the old Rule 404 which had the phrase to rebut the defensive theory. We don't have that now. Also to repeat the comments of the prosecution, he stated a few minutes ago that the reason for the offering of this is because it relates to the whole crime. That indicates the government's intent to present his to the jury so that they can consider it for the whole crime, the whole conspiracy. And the problem this Court has is that if it is admissible, it would only relate to this defendant, Rogers, and not these co-defendants.

MR. STEPHENS: That's right. As to Avery Rogers only.

MR. ETHINGTON: But the government has articulated that they intend to offer it to prove the whole crime.

MR. STEPHENS: No.

MR. ETHINGTON: That's the words that were used a few minutes ago, Your Honor.

MR. STEPHENS: As to Avery Rogers. Intent and knowledge of Avery Rogers in his conduct here.

MR. ETHINGTON: Well, we understand what they say now. But what we're saying is what they said a few minutes ago was they wanted to offer this to show the whole conspiracy. That's in the record. That's their intent. We would object to that on behalf of these co-defendants.

MR. DEAN: I'm going to point out this, Your Honor, the conversation really doesn't prove anything anyway. Here's a conversation that occurs after the date of

the arrest. And if I understand what Mr. Stephens says the man is going to say, is that he knows somebody he can get dilaudid from. Now, that doesn't prove the March 30th/April 8th conspiracy. That has to do with the knowing possession with the intent to distribute dilaudid. And you'd have to apply the greatest degree of speculation to that post-conspiracy statement to even get it back into the duration of the conspiracy that we're trying here.

THE COURT: I don't understand how we get it back into the conspiracy.

MR. STEPHENS: your Honor, it -- what it does as to Avery Rogers only, the only defendant it would be admissible to, or against, would show his knowledge and intent in his conduct in all the charges against him, period.

THE COURT: Conspiracy part, too?

MR. STEPHENS: Conspiracy part too, yes, sir.

THE COURT: I guess so.

MR. STEPHENS: Yes Sir. And the law is clear in the Fifth Circuit, there's a slew of cases that say makes no difference whether it's before or after the --

THE COURT: I undersatnd.

MR. STEPHENS: -- alleged offense.

MR. LOFTIN: May it please the Court, to interject one other minor point before this jurisdiction. In light of the fact that another case has been tried and Cooper was used in that case to testify, how many times does the government, can they -- you know, they allege -- they go one way with one other case, they now go another way with this case, and it puts me in a situation where whatever the ruling is I lose. In other words, in the case

MR. ETHINGTON: Judge, what we've got is he presents his evidence and creates an artifical issue so he can bring in extraneous matters. We're the ones that raise the issue or not when we put the defendant or defense witnesses up there. He's created a strawman now he wants to knock it down.

THE COURT: You raise the issue when you say not guilty. That puts his intent and everything else in issue. And intent is hard to prove sometimes. I'm going to go ahead and go along --

MR. ETHINGTON: Judge, they have direct testimony as to intent in now, and these notes say that this sort of thing should be admissible if there's no other avenues of evidence available to the government. They have wiretaps, they've got direct witness testimony from the agents, and now

they want to use something that is highly prejudicial.

THE COURT: Okay. We'll just have to see. But I think the relevancy outweighs the prejudicial effect as far as the trial of this case is concerned. And I am going to let him testify, and I will overrule you motion for severance.

MR. LOFTIN: Note our exception.

THE COURT: Now, do we have any more problems -- is this Cooper, was he involved in all of this? Did I sentence him?

MR. STEPHENS: No, sir. Judge Robinson did for him dealings with Mr. Williams up in Amarillo.

THE COURT: If that where he -- oh, I remember. When Mr. Williams was supposed to go to the penitentiary, that guy was out here at FCI, and they didn't want them together.

MR. STEPHENS: That's right.

THE COURT: I forgot what the deal was. Okay.

MR. ETHINGTON: And for record purposes, that's exactly our point. Cooper was not, as the government admits, involved in all this.

THE COURT: Was not what?

MR. EHTINGTON: Not involved in all this.

THE COURT: Okay. All right. Let's see. Where is the jury?

MARSHAL: They will be upstairs.

THE COURT: Okay. Bring them back down if they're all up there, please, and let's get started.

MARSHAL: May I approach the bench?

THE COURT: Yes.

(Off the record discussion between Judge and Marshal.)

THE COURT: All right. The Marshal says that Mr. Cooper asked the Marshal to tell Mr. Stephens that Cooper wants to talk to him before he testifies.

MR. ETHINGTON: Maybe it's not relevant after all, Judge.

THE COURT: He may not -- I don't know what's going to happen.

MR. DEAN: We'd like to have that broadcast out here in the courtroom.

THE COURT: Let me know what the deal is. Don't bring them down yet. Let's see what happens here.

APPENDIX J

DIRECT EXAMINATION

BY MR. STEPHENS:

...

THE COURT: Let me instruct you, ladies and gentlemen, that we've had a hearing here out of your presence. And Mr. McCuistion is going to testify about three conversations with Mr. Williams, one in January, March and February of '83; and two of them were about cocaine, and one of them was about marijuana. Now, Mr. Williams is not being tried for cocaine or marijuana, but we are going to admit this evidence only as to Mr. Williams. So when you deliberate, you are not to consider that in any way as to his guilt or innocence as far as this case is concerned because he's not charge with that. Are you with me? This is a conversation and

it's admissible for your consideration, but bear in mind he has not been charged or indicted for these matters that he's about to talk about. Go ahead.

MR. STEPHENS: Thank you.

THE COURT: And I might tell you, too--well, go anead.

BY MR. STEPHENS:

Q. Where was he staying during the times when he was in Amarillo during that period?

A. Initially he stayed in the Villa Inn Hotel and then stayed in the Three Falcons Apartments.

Q. All right, sir. And during this period of time from January to April of 1983, would you tell the jury what kind of work you were engaged in at that time, yourself?

A. Sales of narcotics, mainly cocaine and marijuana.

Q. Were you doing any other kind of work?

A. I was also piddling with trading some horses, selling them in that area, too.

Q. Were you making any money off selling horses?

A. Not near as profitable as the cocaine and marijuana.

Q. All right, sir. And prior to January of 1983, had you done any selling of narcotics?

A. Not to my recollection, sir.

Q. All right, sir. What kind of business were you in then, or what kind of work have you done over the years?

A. Over the years, I've worked as a

salesman for a pharmaceutical company in Lincoln, Nebraska; I've worked as a hardware carpenter is what we call it, you install cabinets and doorknobs and that kind of stuff; and worked as a AI technician breeding cattle and horses artificially.

Q. All right, sir. What year did you graduate from college ther at West Texas?

A. Graduated in August of 1978.

Q. All right, sir. Now, then, you said January to April you were selling cocaine and marijuana. Would you tell the jury who you were selling it to?

A. Yes. I was selling the product to a man named Raymond Harmon.

Q. Was that in Amarillo?

A. Yes, sir.

Q. all right. Now, then, I direct our attention to the month of March 1983, and ask you if you had an occasion in that

month to loan any money to anyone?

A. Yes, sir. I loaned $5,000 to Jerry Williams in order to --

Q. All right, sir.

A. For --

Q. And what was that loan for?

A. In order to obtain some cocaine so I could sell it.

MR. DEAN: Your Honor, his conclusion about what it's for is not admissible.

MR. STEPHENS: I'll rephrase the question, Your Honor.

THE COURT: All right.

BY MR. STEPHENS:

Q. Did Jerry Williams tell you what he was going to use the money for?

A. Yes, sir.

Q. What did he tell you?

A. He told me he was going to purchase some cocaine.

Q. All right, sir. And after he borrowed the money from you, did he leave and return over a period of time?

A. Yes, sir.

Q. And upon his return, did he have an occasion to show you anything?

A. He had four ounces of cocaine.

Q. All right sir. Thank you. And did he say anything to you about it?

A. Told me this is four ounces of cocaine to sell.

Q. All right, sir. And did you sell some of it?

A. Yes, sir, we sold it all.

Q. All right. What kind of financial arrangement did you have with Mr. Williams in the sale of the cocaine?

A. Supposed to have been a 50/50 partnership.

Q. Okay. Did it work out quite that

well?

A. Well, neither one of us is rich.

Q. Did you make much money off of it?

A. No. This -- it was poor quality and it just piddled out, you know, died out and there wasn't any big profit in it.

Q. All right, sir. And who did you sell the cocaine to?

A. It was through Ray Harmon.

Q. Ray Harmon?

A. Yes, sir.

Q. All right, sir. Now let me direct your attention to the preceding month of February 1983, and ask you is you had an occasion to meet Jerry Williams at the airport, the airport in Amarillo during that month?

A. Yes, sir.

Q. And where did you go from there?

A. When we left the airport, we went

to Cliff's Bar and we stood around there and drank for several hours, then we split up and he checked in the hotel at the Villa Inn, and I went on in.

Q. Went on home?

A. Yes, sir.

Q. All right, sir. Did you have occasion to see him the next day?

A. Yes, the next afternoon.

Q. Where was tht?

A. At the Villa Hotel in Amarillo

Q. Okay. did he show you anything there in the hotel that day?

A. Yes. We had at that time he had six ounces, five or six ounces of cocaine in his possession.

Q. And what did he do with it, if anything?

A. He asked me if I knew if there was anyone anywhere, you now, to sell the

product, and I told him I knew of one individual that I could talk to and see if he could handle it.

Q. All right. And did you do that?

A. Yes, sir.

Q. And did he handle it?

A. Yes, sir.

Q. And who was that?

A. That was Ray Harmon.

Q. Okay. And what was the financial arrangement between you and Mr. Williams on this?

A. Jerry explained to me that he was in a little bit of financial trouble and I told him at the time that I wasn't above helping him out, but when things go better I expected my share of the profit, or the proceeds from the sales.

Q. All right, sir. Were you bringing money back to him, or how, upon sale of

the --

A. Right. I would deliver the cocaine to Ray Harmon, and then I would pick up the money possibly the next day and bring the money to Jerry Lewis -- or Jerry Williams. Excuse me.

Q. All right. Let me direct your attention to the preceding month, January of 1983, and I believe that's the month you said you first officially met Jerry Williams.

A. Yes, sir.

Q. Now, where was it you met him?

A. In Weatherford, Texas.

Q. All right. And where was that that you met him?

A. The initial meeting where I was introduced was in a night club bar situation there in Weatherford, and the next morning after -- we went to the motel room

that night and the next morning I went to his house.

Q. All right, sir. At his house in what town, or around what town?

A. In Weatherford.

Q. All right, sir. And did he show you anything there?

Q. Yes. There was approximately 40 pounds of marijauna in his garage.

Q. All right, sir. And did he say anything to you about it?

A. Asked me if I knew where I could sell some of that, and I told him that I would take ten pounds of it back to Amarillo and try to sell it.

Q. All right, sir. And did you do that?

A. Yes.

Q. And what kind of financial arrangement did you have with Mr. Williams on

that?

A. There was a problem with the quality of the marijuana in that it wasn't a real good grade, it had a lot of seed and stuff to it, a lot of bulk on the stem, so there wasn't a set price. Somewhere around 3 or 400 a pound is what he was going to have to pay for it, and he would me to try and sell it for 5, 6, whatever I could get for it

Q. All right. Did you finally sell the portion you had?

A. Yes, we sold -- I sold a little, and then it just -- it was a pain, so I dealt it through Ray Harmon.

Q. All right, sir.

THE COURT: Let me -- have you brought up these transactions?

MR. STEPHENS: Yes, sir. There's a little bit more here about Mr. Williams

that's directed to him only. That's the three transactions, yes, sir.

THE COURT: All right. let me reinstruct you all. As I told you, the testimony of Mr. McCuistion is only directed now, the testimony so far, to Mr. Williams. And Mr. Williams is not on trial for any act or conduct or offense, now, not alleged in the indictment, so he's not on trial for the cocaine and the marijuana. But such evidence or testimony that an accused committed an act at one time or on one occasion is not evidence or proof whatever that such person did a similar act at another time or on another occasion. You can consider this evidence, but only in connection with this instruction. In other words, testimony that a defendant may have committed at some time or other an act similar to the act or acts

alleged in the indictment in this case may not be considered by the jury in determining whether the accused, in fact, committed any act alleged in the indictment. Evidence or testimony concerning an act of a similar nature allegedly committed at some time or place not charged in the indictment may not be considered for any purpose whatsoever unless the jury first finds that the other evidence in the case, standing alone, establishes beyond a reasonable doubt that the accused did the particular act charged in the indictment under deliberation. On the other hand, if the jury should find beyond a reasonable doubt from other evidence in the case that the accused did the act charged in the indictment. And where proof of an alleged similar act done at some other time and place is clear and conclusive, the

jury may, but is not obliged to, draw the inference and find that in doing the act charged in the indictment, the accused acted wilfully and not because of mistake, or accident, or other innocent reason.

All right. Go ahead.

MR. ETHINGTON: Your Honor, excuse me. May we have an instruction to the jury from the court that this testimony that's just been elicited is for the jury to consider against Mr. Williams only if it's used to, and per your instruction there, and is not admitted or offered for the consideration of Mr. Rogers and I guess this other fellow, too. May we have that instruction, Your Honor?

THE COURT: I thought I instructed. The testimony about the two cocaine transactions and the marijuana transaction is directed solely to Mr. Williams. All

right.

MR. ETHINGTON: Thank you, Your Honor.

BY MR. STEPHENS:

Q. Now, then, Mr. McCuistion, directing your attention to early April of 1983, did you have an occasion to have a discussion with Mr. Williams, or could you describe to the jury the condition of finances between you and Mr. Williams at that time?

A. Okay. There was still money owed for the part of the last cocaine that was brought back to Amarillo, and there wasn't any money left to be collected enough to in order to pay the debt, the total debt.

Q. Your debt to where you were getting it?

A. To where we were getting the cocaine.

Q. All right. All right, sir. This

that context, let me direct your attention specifically to a period -- does the date of April the 8th mean anything to you?

A. Yes, sir.

Q. All right.

A. That was -- that was the day that Jerry Williams was arrested in the D/FW airport.

Q. All right. Now, then, using that as a reference point, within one to two days prior to that, did you have any such discussion with Mr. Williams regarding finances and how to cure some problems?

A. We had discussed coming to the Dallas/Fort Worth area to face up to the man that was supplying the cocaine to us and telling him that we didn't have his money, and we'd do something to come up with the money to pay the debt.

Q. All right. And then after that did

he come up with a solution and tell you anything about why he --

MR. ETHINGTON: To which we object. He's suggesting again what questions -- it's leading and suggestive and we'd object. We'd just like to have the witness try to testify.

THE COURT: All right. Don't lead him now.

BY MR. STEPHENS:

Q. Did he state with with reference as to whether or not anything at all to you about any solution to this problem? Without answering the question, did he?

A. Yes.

Q. And was that within a period of a couple of days prior to April the 8th?

A. Yes.

Q. All right.

MR. STEPHENS: Your Honor, this will be

the statement made under the James ruling at that time which we would offer in admission to all the defendants.

THE COURT: All right. This is being offered as to all the defendants. Go ahead.

BY MR. STEPHENS:

Q. All right, sir. Would you tell the jury what it was that Mr. Williams told you then?

A. On approximately the 5th or 6th of April, Jerry confronted me with the fact that they there was to be a pick up and delivery of a nar -- dilaudids to Tulsa, Olkahoma to Avery Rogers, that he and Sonny Robinson were going to meet at D/FW Airport and take the dilaudids to Tulsa, Oklahoma.

Q. All right, sir. And did he tell you that with reference to anything bet-

ween you and him?

A. The reason the conversation was carried onto the fact that we were behind on that --

MR. LOFTIN: Your Honor, we're going to object to that as not being an answer to the question. His reasoning behind it -- that's imporper examination, he can testify what was said and what's not said, but his interpretation of everybody's understanding, and ask an instruction to the jury to disregard this statement.

THE COURT: All right.

MR. STEPHENS: If you could do that by telling what was said by each party.

THE COURT: All right. Disregard the statement as to his reason. Go ahead.

THE WITNESS: Would you repeat the question?

THE COURT: Richard, ask the question.

BY MR. STEPHENS:

Q. All right, sir. At this time when this was being told to you, would you tell the jury what the context of the conversation was, what you and Mr. Williams were talking about, and the -- at the time he told you about the dilaudid going to Tulsa?

A. The proceeds from the dilaudid sales were to pay help -- help pay for our debt on the cocaine and also hopefully to get some more cocaine back and moving it into Amarillo.

Q. For who to sell?

A. For me to sell to Ray Harmon.

Q. Did he say how that was going to come about, how that would cause more cocaine to come back to you?

A. By paying Mr. Robinson the money that we owed him on the cocaine, we could

get more fronted to us and we'd just have to be more careful about how we handled the money when we picked it up from our sales.

Q. All right. And did, in fact, or would you state for evidence whether or not Mr. Williams did leave on April the 8th?

A. Yes.

Q. All right. And on that date, did you have an occasion to talk with Avery Rogers?

A. Yes, the evening of the 8th.

Q. All right. And would you tell the jury what it was you told him and what he said to you?

A. I told him at the time I finally got hold of him on the phone that Jerry had been arrested at D/FW Airport, and that --

Q. Did you tell him how you learned it?

A. No. I may have told -- I don't remember for sure if I told him that I had talked with Jerry's wife or what.

MR ETHINGTON: Judge, we object to that. It's suggesting to him what the answer would be. We'd ask just the witness to testify and not Mr. Stephens.

THE COURT: All right. Don't lead.

BY MR. STEPHENS:

Q. What did you say to him?

THE COURT: Did you find out that Jerry had been arrested?

THE WITNESS: Did I find out?

THE COURT: Yes.

THE WITNESS: Yes.

THE COURT: Do you know how, or remember how you found out?

THE WITNESS: I know how I found out,

yes. Pam Williams called me and told me that Jerry had been arrested.

BY MR. STEPHENS:

Q. All right, sir. Then what did you tell --

MR. DEAN: We object to that, Your Honor, to -- it's hearsay as to the Defendant Williams.

THE COURT: All right. It doesn't make any difference. Go on. Disregard about Ms. Williams calling McCuistion or him calling Ms. Williams.

BY MR. STEPHENS:

Q. What can you did you tell Avery Rogers?

A. That Jerry had been arrested.

Q. Okay. And what did he say to you?

A. He said that's great.

Q. Okay. Would you tell the jury why you called Avery Rogers to tell him that?

A. Because Avery was to meet Jerry Williams and Sonny Robinson at the Tulsa Airport to pick up the dilaudid.

Q. So you were just letting him know what happened?

A. Yes.

Q. All right. Now, Mr. McCuistion, if you would, tell the jury what convictions, if any you have. What have you been convicted for? What felony convictions?

A. I have a felony conviction for solicitation of narcotics.

Q. Is it for facilitating the distribution of narcotics by use of a telephone?

A. Yes.

Q. All right. And in that, did you enter a plea of guilty?

A. I did.

Q. And would you tell the jury what, if anything, any kind of agreement you

had or made in that plea of guilty?

A. I agreed to appear in court.

Q. And to testify truthfully?

A. Yes.

Q. All right. Anything else that you promised to do, or is that it?

A. No.

Q. All right. And what did -- did the government promise not to prosecute you on other offenses?

A. True.

Q. All right.

MR. STEPHENS: Pass the witness.

THE COURT: Let me give you this instruction on Mr. McCuistion just to refresh your memory. The fact that a witness has previously been convicted of a felony is also a factor you may consider in weighing the credibility of that witness. The fact of such conviction does not necessarily

destroy the witness's credibility, but is one of the circumstances you may take into account in determining the weight to be given to this testimony. All right. Who wants to question Mr. McCuistion?

MR. DEAN: I'll go ahead.

APPENDIX K

Proceedings of April 23, 1984

THE COURT: Okay. At 4:50 p. m. on April 23rd, 1984 the jury sent in the following note:

"To the Honorable Judge:

"We have an eleven to 1 verdict, and seems to be a positive hang-up.

"What would you suggest? Harry Skaggs, Foreperson."

And I'm going to write them at 5 p. m.

"Members of the Jury: I am going to ask that you recess for the day and return tomorrow, Tuesday, at 9:00 a.m. and resume your deliberations.

"In any future notes, do not tell us how you stand if you are divided."

Now, if you all think they ought to be discharged for whatever it's worth you can make a motion that the trial lasted four

and a half days and they've been out two full days, but that's your business. I'm not going to discharge them, but you can make a motion, for whatever it's worth.

MR. LOFTIN: I understand. To the Honorable Judge of said Court, we have been here a total of four and a half days.

THE COURT: I'm going to let him take this.

MR. LOFTIN: All right.

THE COURT: All right. Go ahead.

MR. LOFTIN: And in regard to my client, Mr. Robinson, I would respectfully request the Court that this jury is hopelessly deadlocked; that, in light of the fact they have deliberated two full days. But the deliberations began on a Thursday, today is a Monday, they deliberated a full day Thursday, they had the charge Wednesday night, then they've been at recess

until this morning, in my opinion it's hopelessly deadlocked and any further deliberations will have the adverse effect of have having a full concise jury verdict, and for this reason we would respectfully request the Court to delcare a mistrial at this time.

...

(Jury present at 3:15 p.m.)

...

COURT CLERK: We the jury find the defendant William Thomas Robinson, a/k/a Sonny Robinson, guilty of the charge in Count 1 of the indictment.

THE COURT: Is that the verdict of each juror? All right.

COURT CLERK: We the jury find the defendant William Thomas Robinson a/k/a Sonny Robinson guilty of the charge in Count 2 of the indictment of possession of a con-

trolled substance with intent to distribute.

THE COURT: Now wait a minute. All right. Is that the verdict of each juror? All right.

COURT CLERK: We the jury find the defendant William Thomas Robinson, a/k/a Sonny Robinson, guilty of the charge in Count 3 of the indictment.

THE COURT: Let me see. All right. Is that the verdict of each and every juror? All right. Let me see the thing. All right. Count 2 of the indictment you found Sonny Robinson guilty, which was possession of a controlled substance with intent to distriute. Is that the verdict of each juror as to Count 2? All right. You weren't supposed to answer Count 3 if you found guilty on Count 2, but you wrote in guilty and then initialed striking it

out, so that should have been blank on the lesser -- on just possession.

JURY FOREMAN: That's correct.

THE COURT: Is that the verdict of each juror then? That -- you shouldn't have answered. All right. Four.

COURT CLERK: We the jury find the defendant William Thomas Robinson, a/k/a Sonny Robinson, guilty of the charge in Count 3 of the indictment.

THE COURT: Is that the verdict of each and every juror as to Count 3? Do you all know what Count 3 was? I think it's telephone communication. Let me have the indictment.

FOREMAN: That's correct.

THE COURT: Is that the telephone communication.

MR. STEPHENS: It is the telephone communication.

THE COURT: Is that the telephone communication? That count had to do whether or not he was using the telephone to facilitate the distribution of dilaudids. And you have we the jury find Robinson guilty as to what count?

COURT CLERK: Count 3

THE COURT: Count 3. Is that the verdict of each juror using the telephone? All right.

COURT CLERK: And then we the jury find the defendant William Thomas Robinson, a/k/a Sonny Robinson, guilty of the chart (sic) in Count 4 of the indictment.

THE COURT: Is that the verdict of each juror to Count 4? Four, was that telephone too?

MR. STEPHENS: Yes, Your Honor.

THE COURT: That was using a telephone on a different date to distribute Dil-

audid. Was that the verdict of each juror, now, as to the second use of the phone? All right.

COURT CLERK: April 24th, 1984, signed Harry M. Skaggs foreperson.

...

JURY DELIBERATIONS AND VERDICTS

THE COURT: Would you give the verdict to the Marshall, please, sir?

JURY FORMEN: (Complies)

THE COURT: All right. Ladies and Gentlemen, I will ask Mrs. Alexander to read the verict. And after she reads it as to each defendant, I'm going to ask you to raise your hand to signify that that is your verdict.

COURT CLERK: We the jury find the defendant Jerry Dwain Williams guilty of the charge in Count 1.

THE COURT: Is that the verdict of each

and every juror? All right.

COURT CLERK: That's the only count that's answered. Signed Harry M. Skaggs.

THE COURT: All right.

COURT CLERK: We the jury find the defendant Avery Rogers guilty of the charge in Count 1. Signed Harry M. Skaggs.

THE COURT: Is that the verdict of each and every juror? All right.

COURT CLERK: We the jury find the defendant William Thomas Robinson, a/k/a Sonny Robinson, guilty of the charge in Count 1 of the indictment.

THE COURT: Is that the verdict of each of you as to Count 1 as to Robinson?

All right, Now, without going over these counts, there are several that haven't been answered, and I'm going to instruct you further.

(2)

No. 85-67

Supreme Court, U.S.
FILED
NOV 25 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

WILLIAM THOMAS ROBINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was entitled to a severance because of the introduction of evidence against a co-defendant showing that the co-defendant had been involved in prior drug transactions.

2. Whether the special parole provision of 21 U.S.C. 841 is unconstitutional because it delegates to the sentencing judge the legislative authority to determine the maximum penalty.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B1-B31) is reported at 759 F.2d 20 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 27, 1985. A petition for rehearing was denied on April 26, 1985 (Pet. App. A1-A3). The petition for a writ of certiorari was filed on June 19, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted of conspiracy to distribute and possession with intent to distribute dilaudid, in violation of 21 U.S.C. 846 and 841(a)(1) (Counts one, two), and two counts of using a telephone to facilitate the distribution, in violation of 21 U.S.C. 843(b) (Counts three, four). He was sentenced to concurrent terms of 15 years' imprisonment on Counts one and two and four years' imprisonment on Counts three and four, to be followed by a special parole term of three years.[1] The court of appeals affirmed (Pet. App. B1-B31).

1. The evidence at trial, the sufficiency of which is not in dispute, is summarized in the opinion of the court of appeals (Pet. App. B3-B8). In-court testimony and recordings of telephone conversations intercepted pursuant to a court-authorized wiretap showed that petitioner and co-defendant Williams, operating out of Texas, conspired with co-defendant Rogers, who worked and resided in Oklahoma, to distribute dilaudid tablets, a Schedule II controlled substance. In particular, telephone calls between petitioner and Williams' wife, arranging for a meeting to take place in Oklahoma between the three defendants, led to the issuance of a search warrant executed upon petitioner and Williams at the Dallas/Fort

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[1] Co-defendants Jerry Dwain Williams and Avery Rogers, tried jointly with petitioner, were similarly convicted of conspiracy, possession with intent to distribute dilaudid, and use of the telephone to facilitate the narcotics distribution. Their convictions were also affirmed by the court of appeals. A petition for a writ of certiorari (No. 84-6904) filed by co-defendant Williams was denied by this Court on October 7, 1985.

Worth Airport as they were leaving for Oklahoma. At that time, a search of petitioner's boots uncovered two bottles of dilaudid, containing approximately 1,000 pills. Petitioner and Williams were arrested at that time, and Rogers was later arrested in Oklahoma.

2. A government witness, Terry McCuistion, testified concerning his cocaine and marijuana dealings with co-defendant Williams in the months immediately preceding Williams' arrest (III Tr. 118-122). The court repeatedly gave comprehensive limiting instructions to the jury that most of McCuistion's testimony was relevant only to defendant Williams and explained its purpose under Fed. R. Evid. 404(b) (see III Tr. 115-116, 122-123, 124).[2] One statement made by Williams to McCuistion was admitted against all defendants: McCuistion testified that Williams said, one or two days before Williams' arrest, that he and petitioner were going to meet at the Dallas/Fort Worth Airport and then deliver dilaudid pills to Rogers in Tulsa, Oklahoma; Williams told McCuistion that he planned to use his profits from the sale of dilaudid to pay off a debt to petitioner for some cocaine so that he could get more cocaine "moving into Amarillo" (Pet. App. B8-B9; III Tr. 126-127).

3. The court of appeals rejected petitioner's contention that he should have been granted a severance because of McCuistion's testimony. The court found that the jury understood that most of McCuistion's

---

[2] The court of appeals rejected Williams' argument that this evidence should not have been admitted against him. The court held that the evidence was properly introduced to counter Williams' defense that he was travelling to Oklahoma to sell race horses, not dilaudid. Pet. App. B8-B12.

testimony was admitted against Williams only. Pet. App. B13-B14.

ARGUMENT

1. Relying on *Bruton* v. *United States*, 391 U.S. 123 (1968), petitioner argues that his motion to sever should have been granted because he was prejudiced by McCuistion's testimony. Petitioner does not clearly distinguish between the evidence that was admitted against Williams alone and the evidence that was admitted against all defendants. It is clear, however, that no error was committed in refusing to grant the severance.

a. Petitioner appears to argue that a severance should have been granted because he was implicated in Williams' cocaine dealing by McCuistion's testimony. Contrary to petitioner's argument, *Bruton* is not applicable in such a case. In *Bruton* the co-defendant confessed that he and Bruton had committed the robbery for which they were on trial, and the confession was introduced at trial with instructions directing the jury to limit its consideration of the confession to use against the co-defendant. The Court concluded that in such a case, where the statement was powerfully incriminating with respect to the precise issue that was the subject of the trial, it could not be assumed that the limiting instructions were effective. This case is quite different because the evidence of Williams' prior cocaine dealings did not implicate petitioner in the crime for which he was charged and convicted and for the most part did not even mention petitioner. There is no reason to believe that the jury did not follow the district court's limiting instructions, as the court of appeals concluded.

Petitioner suggests (Pet. 18) that the initial instructions limiting consideration of the evidence of prior cocaine dealings between McCuistion and Williams to Williams alone were contradicted by the court's subsequent instruction that one part of McCuistion's testimony—Williams' statement that he and petitioner were going to deliver dilaudid tablets to Rogers in Oklahoma—was being admitted against all defendants (III Tr. 126). But the instruction stating that that one statement was admitted against all defendants directly followed the prosecutor's specific reference to "the statement * * * which we would offer in admission to all the defendants" and immediately preceded the statement that Williams told McCuistion that he and petitioner were going to deliver dilaudid tablets to Rogers in Oklahoma (*ibid.*). We fail to see how the district court could have instructed the jury more clearly. Additionally, petitioner did not object below that the second instruction was contradictory, confusing, or harmful to his defense.

b. If petitioner is complaining about admission of the one statement by Williams that was admitted against all defendants, his argument has no basis. That statement was admitted under the co-conspirator exception to the hearsay rule. As the courts of appeals have uniformly held, *Bruton* is inapplicable to statements admissible under that exception. See *United States* v. *Norton*, 755 F.2d 1428, 1431 (11th Cir. 1985); *United States* v. *Carter*, 721 F.2d 1514, 1535 n.30 (11th Cir. 1984), cert. denied, No. 83-1743 (Oct. 1, 1984); *United States* v. *McCown*, 711 F.2d 1441, 1448 (9th Cir. 1983); *United States* v. *Roberts*, 583 F.2d 1173, 1176-1177 (10th Cir. 1978), cert. denied, 439 U.S. 1080 (1979); *United States* v. *Arch-*

bold-Newball, 554 F.2d 665, 667 (5th Cir.), cert. denied, 434 U.S. 1000 (1977).[3]

Moreover, any error in the admission of Williams' statement was assuredly harmless. Intercepted telephone calls established that petitioner and Williams would fly from Dallas to Tulsa to deliver a substantial quantity of pills. In fact when petitioner and Williams were arrested at the airport, Williams was in possession of airline tickets for the two men to Tulsa, petitioner was in possession of the 1,000 tablets hidden in his boots, and co-defendant Rogers was arrested at the Tulsa airport awaiting his co-conspirators' arrival on the flight from Dallas (Pet. App. B16). Williams' out-of-court statement to McCuistion merely described plans that, as other evidence overwhelmingly established, were followed to the letter. Under these circumstances, petitioner's alleged inability to cross-examine Williams was plainly harmless beyond a reasonable doubt. See *Schneble* v. *Florida*, 405 U.S. 427 (1972); *Harrington* v. *California*, 395 U.S. 250, 254 (1969); *United States* v. *Tashjian*, 660 F.2d 829, 839 n.18 (1st Cir.), cert. denied,

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[3] The court of appeals' equivocation notwithstanding (see Pet. App. B15-B16), Williams' statement that was admitted against all defendants was clearly in furtherance of the conspiracy. The evidence showed that petitioner, his two co-defendants, and McCuistion were joined in a conspiracy to distribute narcotics; that Williams and McCuistion were in financial difficulty; that Williams told McCuistion about the plans to sell dilaudid to Rogers in Tulsa to pay off their narcotics debt and resume the flow of narcotics into Amarillo; and that after learning of Williams' and petitioner's arrest at the Dallas/Fort Worth Airport, McCuistion telephoned Rogers to inform him (III Tr. 116-129). Given the relationship of the statement to the overall conspiracy, the district court correctly found it to be in furtherance of the conspiratorial scheme.

454 U.S. 1102 (1981); *United States* v. *Halliday*, 658 F.2d 1103, 1105 (6th Cir.), cert. denied, 454 U.S. 1127 (1981).

2. Petitioner's claim (Pet. 21-24) that the special parole provision of 21 U.S.C. 841 [4] is unconstitutional because it delegates to the judiciary the legislative function of setting the range of potential punishment is frivolous and has been uniformly rejected by the courts of appeals.[5] As the Seventh Circuit explained, while Section 841 "does not expressly specify the maximum parole term, * * * it can only be read as authorizing a lifetime maximum parole term." *United States* v. *Bridges*, 760 F.2d 151, 153 (1985) (citing cases).[6] The contrary decision relied upon by petitioner (*United States* v. *Tebha*, 578 F. Supp.

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[4] Section 841(b)(1)(A) provides, in pertinent part, that "[a]ny sentence imposing a term of imprisonment under this paragraph shall * * * impose a special parole term of at least 3 years in addition to such term of imprisonment."

[5] See, *e.g.*, *United States* v. *Arellanes*, 767 F.2d 1353, 1358-1359 (9th Cir. 1985) (citing cases); *United States* v. *Carcaise*, 763 F.2d 1328, 1334-1335 (11th Cir. 1985); *Walberg* v. *United States*, 763 F.2d 143, 147-149 (2d Cir. 1985); *Yates* v. *United States*, 753 F.2d 70, 71 (8th Cir. 1985), cert. denied, No. 84-6382 (Apr. 15, 1985); *United States* v. *Hernandez*, 750 F.2d 1256, 1260 (5th Cir. 1985); *United States* v. *Walden*, 578 F.2d 966, 972 (3d Cir. 1978), cert. denied, 444 U.S. 849 (1979); *United States* v. *Jones*, 540 F.2d 465, 468 (10th Cir. 1976), cert. denied, 429 U.S. 1101 (1977).

[6] In any event, the statute clearly provides for the three-year special parole term petitioner received. That is the *minimum* term under Section 841(b)(1)(A), and petitioner has no standing to complain about the manner in which the statute authorizes imposition of a greater special parole term than he received. Cf. *United States* v. *Raines*, 362 U.S. 17 (1960).

1398 (N.D. Calif. 1984)) has itself been reversed recently by the court of appeals. *United States* v. *Tebha*, 770 F.2d 1454 (9th Cir. 1985); see also *United States* v. *Arellanes*, 767 F.2d 1353, 1358-1359 (9th Cir. 1985). Thus, there is no conflict on this issue and there is no warrant for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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